88-639

No. ———

Supreme Court, U.S.
FILED
OCT 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, in a case of first impression, the Court of Appeals erred in its decision that, by enacting § 304 of the United States Bankruptcy Code, Congress intended to disturb the heretofore exclusive jurisdiction exercised by the states over probate proceedings by extending federal jurisdiction to provide for bankruptcy court administration of the United States assets of a foreign decedent's estate?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Edgardo L. Parungao, Georgia Administrator *cum testamento annexo* of the estate of Heinz Guenter Kaussen, deceased, and the Respondent, Klaus Hubert Goerg, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Edgardo L. Parungao, through his counsel, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on May 18, 1988. A petition for Rehearing and en banc consideration was denied on July 18, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated May 18, 1988 is reported at 844 F.2d 1562 and is reproduced in the Appendix hereto at page 1a.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division dated January 8, 1987 has not been reported. It is reproduced in the Appendix hereto at page 15a.

The opinion of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated August 26, 1986 is reported at 64 Bankr. 321, and is reproduced in the Appendix hereto at page 22a.

Additional orders and judgments relating to the case under review are cited in this petition and reproduced in the Appendix as appropriate.

JURISDICTION

Petitioner seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit. A rehearing of the judgment and opinion dated May 18, 1988 was timely sought and denied on July 18, 1988 (See, Appendix p. 34a).

The jurisdiction of this Court to review the judgments of the Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 304 of the Bankruptcy Code, Public L. No. 95-598, 92 Stat. 2560 (1978):

§ 304. *Cases ancillary to foreign proceedings.* (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title [11 USCS §§ 101 et seq.];

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

STATEMENT OF THE CASE

A. Procedural and Factual Background

Heinz Guenter Kaussen ("Kaussen"), a resident and citizen of the Federal Republic of Germany ("West Germany"), died in April, 1985. At the time of his death, Kaussen owned substantial property in West Germany, Ireland, Canada, California and Georgia.

On May 30, 1985, Petitioner Edgardo L. Parungao ("Petitioner") moved the Probate Court of Fulton County, Georgia for an order that an alleged will of Kaussen dated January 19, 1962 be admitted to probate in solemn form. By consent appeal from the Probate Court to the Superior Court of Fulton County, Georgia, the Superior Court entered an order on July 17, 1985 admitting the will to probate in solemn form and ordered letters of administration with the will annexed be issued to Parungao upon his posting bond and taking the required oath. Parungao qualified immediately. Since the date of his appointment, Petitioner has performed his duties as a Georgia administrator.

Shortly after Kaussen's death, probate proceedings were commenced in the local court of Cologne. That court appointed an administrator who, after determining that the estate was insolvent, petitioned the court to commence bankruptcy proceedings. On January 24, 1986, the West German court in Cologne entered an Order of Adjudication finding that the Kaussen estate was insolvent. The court appointed Respondent Klaus Hubert Goerg ("Respondent") to serve as bankruptcy trustee and authorized him to take possession of Kaussen's property in West Germany, as well as those assets located abroad. The adjudication of bankruptcy and the appointment of Respondent as bankruptcy trustee were affirmed by the Cologne Regional Court and the Cologne Higher Court of Appeals. The Higher Court of Appeals specifically held that "[i]n addition to the domestic property, the Debtor's

bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee."

Though considerable dispute exists regarding the state of his affairs, a preliminary investigation indicated that, at the time of his death, Kaussen's liabilities exceeded his assets by approximately $55 million. Kaussen's business was headquartered in Cologne, West Germany and many of his creditors are located in West Germany as well as in the several jurisdictions where his properties are located. Though not involved in this appeal, it should be noted that other probate proceedings were commenced in California and Canada, jurisdictions outside West Germany where Kaussen owned real and personal property.[1]

In June 1986, Respondent filed a petition pursuant to 11 U.S.C. § 304 in the United States Bankruptcy Court for the Northern District of Georgia, seeking to enjoin Petitioner from prosecuting the Fulton County probate proceeding as the Georgia administrator and to require that the Georgia property be turned over to him for distribution in the West German proceeding. Based upon its interpretation of the language of § 304 and pertinent definitional sections of the United States Bankruptcy Code, the bankruptcy court dismissed the petition. The bankruptcy court held that its jurisdiction to entertain a § 304 petition for ancillary administration of a foreign proceeding was limited to cases in which the subject of the foreign insolvency proceeding qualified as a "debtor" as that term is defined in the Bankruptcy Code. The bankruptcy court then concluded that the insolvent decedent's estate did not qualify as a "debtor" under the Code. Accordingly, the bankruptcy court dismissed Respondent's

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[1] A probate proceeding is presently pending in California. There, the United States Bankruptcy Court for the Northern District of California dismissed the German Representative's § 304 petition and no appeal was taken. The order dismissing the petition is contained in the Appendix at page 36a.

petition for lack of subject matter jurisdiction. See, Appendix, p. 22a for the complete text of "the Bankruptcy Court's decision.").

Goerg appealed the Bankruptcy Court's decision to the United States District Court for the Northern District of Georgia. The District Court affirmed the conclusion of the bankruptcy court that it could not exercise jurisdiction over the Kaussen estate because section 304 does not provide for subject matter jurisdiction over an insolvent foreign decedent's estate. (See, Appendix, p. 15a for the complete text of "the District Court's decision.").

Respondent then appealed to the United States Court of Appeals for the Eleventh Circuit. Recognizing the issue as one of first impression, the Eleventh Circuit reversed the courts below and remanded with instructions that the bankruptcy court entertain the § 304 petition. (See, Appendix, p. 1a for the complete text of the Eleventh Circuit's decision.) While holding that a domestic "decedent's estate" cannot be a "debtor" under Title 11, the Eleventh Circuit held that a foreign decedent's estate need not meet the definition of "debtor" to qualify for United States Bankruptcy Court ancillary administration. Review of the Eleventh Circuit's decision is sought here.

B. Basis for Federal Jurisdiction

Jurisdiction of the Eleventh Circuit to consider the appeal from the District Court is conferred by 28 U.S.C. § 158(d).

Jurisdiction of the District Court to consider the appeal from the Bankruptcy Court is conferred by 28 U.S.C. § 158(a).

Petitioner contends that no provision of law gives the District Court or the Bankruptcy Court original jurisdiction to hear the proceeding brought by the Respondent.

REASONS FOR ISSUING THE WRIT OF CERTIORARI

Since the founding of this country, the general jurisdiction over probate matters and the authority to control the property of a decedent's estate has been exclusively vested in the judiciaries of the various states. As this Court stated in *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 298, 90 L.Ed. 256, 259 (1945), "the reason [is] that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters." In the ensuing two hundred years this fundamental jurisdictional precept has been recognized and adhered to by the federal courts. *Id.*; *Harris v. Zion's Bank Co.*, 317 U.S. 447, 450, 63 S.Ct. 354, 356, 87 L.Ed. 390 (1943); *Sutton v. English*, 246 U.S. 199, 207, 38 S.Ct. 254, 257, 62 L.Ed. 644 (1918); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43, 30 S.Ct. 10, 12, 54 L.Ed. 80, 84 (1909); *Farrell v. O'Brien*, 199 U.S. 89, 101, 25 S.Ct. 727, 730, 50 L.Ed. 101 (1905).

More particularly, it has long been recognized that the fundamental goals and objectives of the federal bankruptcy laws do not require the extension of bankruptcy jurisdiction to include the administration of probate proceedings. As stated in *In re Estate of Hiller*, 240 F. Supp. 504, 504 (N.D.Cal. 1965):

> The purposes of bankruptcy are two-fold: (1) to enable the debtor to get a fresh start in his financial affairs by relieving him of the burden of his unpaid debts; and (2) to provide for an equitable distribution of the debtor's assets among his creditors. [Citations omitted]. Such purposes do not require the application of bankruptcy proceedings to estates of deceased persons.

With the enactment of the current Bankruptcy Code in 1978, 11 U.S.C. § 101 *et seq.*, Congress intended to continue the exclusion of proabte matters from the jurisdic-

tion of bankruptcy courts. (For commentary in this regard, see 2, *Collier on Bankruptcy*, ¶ 304.1, at pp. 304-12 to -14 (15th ed. Supp. June 1985).)

Despite this clear and long standing precedent to the contrary, the decision of the Eleventh Circuit that is the subject of this petition has, for the first time, extended the jurisdiction of the federal judiciary to include the power to administer the assets of a decedent's estate. In essence, the Eleventh Circuit has held that § 304 of the Bankruptcy Code confers jurisdiction to bankruptcy courts to administer the United States assets of a foreign decedent. This Court should grant this petition for the following reasons:

(1) The decision of the Eleventh Circuit is contrary to the apparent intent of Congress in enacting § 304 of the Bankruptcy Code.

(2) The decision of the Eleventh Circuit is a significant departure from the well established procedure in this country regarding the administration of decedents' estates and probate jurisdiction.

(3) The decision of the Eleventh Circuit concerns an important federal question having profound precedential implications.

It should also be noted that this is a case of first impression and, given the importance of the underlying issue, it merits review by this Court.

I. The Decision Of The Eleventh Circuit Is Contrary To The Apparent Intent Of Congress In Enacting § 304 Of The Bankruptcy Code.

A straightforward analysis of the relevant statutory language provides clear evidence of Congress' intent in enacting § 304 of the Bankruptcy Code. It is apparent that Congress did *not* intend to abandon well established jurisdictional boundaries by expanding the jurisdiction of the bankruptcy court to include the administration of

foreign decedents' estates. The precise and unambiguous statutory language indicates that Congress did intend to continue to exclude decedents' estates from bankruptcy jurisdiction by requiring the existence of a "debtor" in order to file a petition pursuant to § 304 of the Bankruptcy Code.

In pertinent part, § 304 provides for the commencement and administration of "cases ancillary to foreign proceedings" as follows:

> (a) A case ancillary to a *foreign proceeding* is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a *debtor* with respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against *the debtor* with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.

(Emphasis added.) 11 U.S.C. § 304(a) and (b).

In 11 U.S.C. § 101, a "foreign proceeding" is defined as follows:

> [a] proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which *the debtor's* domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

Importantly, both § 304 and § 101(22) require or, at the very least, presuppose the existence of a "debtor" as a necessary condition of standing for the filing of a petition pursuant to § 304.

The Bankruptcy Code defines "debtor" as a "person or municipality concerning which a case under this title has been commenced," 11 U.S.C. § 101(12), and defines a "person" as including "individual, partnership, and corporation, but does not include governmental unit." 11 U.S.C. § 101(35). Bankruptcy courts have consistently held that the representative of a decedent's estate is not a "debtor." *See, e.g., In re Estate of Patterson*, 64 Bankr. 807 (Bankr. W.D.Tex. 1986); *In re Estate of Whiteside by Whiteside*, 64 Bankr. 99 (Bankr. E.D.Cal. 1986); *Matter of 299 Jack-Hemp Associates*, 20 Bankr. 412 (Bankr. S.D.N.Y. 1982); *Matter of Jarrett*, 19 Bankr. 413 (Bankr. M.D.N.C. 1982); *In re Estate of Brown*, 16 Bankr. 128 (Bankr. D.D.C. 1981). Additionally, the legislative history of the Bankruptcy Code makes it clear that "[t]he definition [of person] does not include an estate or a trust," H.R. Rep. No. 595, 95th Cong., 2d Sess. 318, *reprinted in*, 1978 U.S. Code Cong. & Admin. News 5963, 6720; S. Rep. No. 989, 95th Cong., 2d Sess. 25, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5811. Hence, it is evident that only a "debtor" may invoke the jurisdiction of a bankruptcy court by filing a § 304 Petition. Because a decendent's estate is *not* included within the definition

of "debtor," it is readily apparent that Congress did not intend to expand the scope of bankruptcy jurisdiction to include the administration of the United States assets of a foreign decedent's estate.

This straighforward analysis has been embraced by the commentators. As *Collier* explains:

> [T]hat a foreign administration of a decedent's estate *is not* a "foreign proceeding" under section 101 is suggested by the fact that both sections 101 and 304 refer to a "debtor," which the Code defines to mean a person or municipality, and a "person" under the Code does not include a decedent's estate. And at least one court has held that the threshold prerequisites for application of section 304 include a showing that the foreign debtor could be a debtor under section 109(a) of the Code. Moreover, that Congress could have intended to exclude American decedents' estates from the protection of the Bankruptcy Code while extending that protection to foreign decedents' estates is a questionable proposition. It may also be significant that the Uniform Probate Code, which the Commission deemed adequate to cover domestic administration of insolvent decedents' estates, provides for "ancillary administration" by "foreign personal representatives." [emphasis in original].

(footnotes omitted). 2, *Collier on Bankruptcy*, ¶ 304.1, at pp. 304-13 to -14 (15th ed. Supp. June 1985).

Despite this very clear and simple rationale, the Eleventh Circuit has reached the opposite conclusion by holding that the Respondent, the representative of a foreign decedent's estate, may invoke the jurisdiction of the bankruptcy court by filing a § 304 Petition. While the Eleventh Circuit correctly concluded (as had the bankruptcy court and the district court) that the term "debtor" as used in the Bankruptcy Code does not include a decedent's estate, the court determined that Congress did not intend the absence of a "debtor" to pre-

clude the bankruptcy court from exercising jurisdiction over the assets of the Kaussen estate in Georgia.

In seeking to divine the intent of Congress, the Eleventh Circuit relied upon the legislative history of § 304. Quoting from *Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454 (2d Cir. 1985), the Eleventh Circuit noted:

> Section 304, which was enacted as part of the Bankruptcy Reform Act of 1978 and which had no predecessor in prior law, "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings." [citations omitted.]

Goerg v. Parungao (In re Goerg), 844 F.2d. 1562, 1568 (11th Cir. 1988). In analyzing this historical background, the Eleventh Circuit failed to make a critical distinction. In enacting § 304, Congress was addressing a void in United States law regarding the ancillary administration of foreign *bankruptcy* proceedings, *not* a void in the laws of the states regarding the administration of the assets of a foreign decedent's estate. At the time of the enactment of § 304, there existed well developed procedures for the ancillary administration of foreign decedents' estates, *see*, Uniform Probate Code, Art. IV, yet there was no provision, state or federal, for ancillary administration of foreign bankruptcies. Hence, it is evident that § 304 was the result of Congressional concern regarding a void in traditional bankruptcy jurisdiction and was not intended to alter traditional probate jurisdiction.

Further, it seems highly unlikely that Congress intended to divest the states of their previously exclusive probate jurisdiction without expressly addressing the issue. This is especially evident in light of Congress' efforts in the wake of *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), to limit bankruptcy jurisdiction and to

provide for state court resolution of proceedings based upon state law claims or state law causes of action related to a case under Title 11. In fact, Congress has clearly mandated that ". . . the district court *shall* abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334. The Eleventh Circuit's conclusion that Congress intended to disturb or divest state probate court jurisdiction over ancillary administration of foreign decedents' estates is obviously inconsistent with this clear Congressional interest in preserving established State fora to adjudicate established state law issues.

Finally, as the district court noted, "[i]t seems unlikely that Congress would exclude American decedent's estates from the bankruptcy code but allow foreign decedent's estates to be protected." (See District Court's Order, Appendix, p. 15a at 19a.) However, the Eleventh Circuit's decision leads to this illogical result.

The straightforward language of Title 11 precludes the bankruptcy court from exercising jurisdiction over a decedent's estate. Importantly, such a result would assist, rather than hinder, the orderly administration of the Kaussen estate. Further, the Eleventh Circuit's decision substantively alters the traditional limits upon bankruptcy jurisdiction and, rather than simplifying ancillary administration, opens a "Pandora's box" of unsolved procedural and substantive issues. Considering the practical effect of the decision, see, Section II, *infra*, it seems obvious that, rather than fulfilling Congressional intent, the result reached by the Eleventh Circuit frustrates it. This Court should not let that decision stand without careful review.

II. The Decision Of The Eleventh Circuit Is A Significant Departure From The Well Established Procedure In This Country Regarding The Administration Of Decedents' Estates And Probate Jurisdiction.

This Court has long recognized that the federal courts may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham v. Allen*, *supra*, 326 U.S. at 494, 66 S.Ct. at 298, 90 L.Ed. at 259 (1945). Consequently, the various states have deveolped intricate and workable rules governing the administration and probate of decedent's estates. Conversely, there are no clear guidelines, rules or statutes upon which a bankruptcy court may rely in administering the assets of a foreign decedent. It is evident that the Eleventh Circuit's conclusion that bankruptcy jurisdiction extends to the administration of a foreign decedent's estate "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Sup. Ct. Rule 17, 28 U.S.C.

Not only does the Eleventh Circuit decision significantly alter the traditional notions regarding probate jurisdiction, it is contrary to the efficient administration of justice. Under the Eleventh Circuit's rationale, bankruptcy courts will be required to address numerous issues far beyond the traditional bounds of their subject matter jurisdiction. Yet, each of the fundamental issues regarding the disposition of the assets of the Kaussen estate located in this country are *specifically* addressed by the probate laws of the various states. In most states, statutory provisions expressly address conflicts of law issues; the ancillary administration of foreign decedents' estates; and, the distribution of the assets of an insolvent estate.

In Georgia, for example, title to a decendent's real property immediately vests in the heirs at law (or devisees under a valid will) at the instant of the decedent's

death. The decedent's personal property is, however, subject to administration for the benefit of creditors by the decedent's legal representative. All other property owned by the decedent vests in the administrator (or executor) of his estate for the benefit of heirs and creditors. O.C.G.A. § 53-4-8. Furthermore, under Georgia law, the validity of a provision of a foreign will passing title to real property located in Georgia is determined by application of Georgia law. O.C.G.A. § 53-3-42; *Gibson v. Gaines*, 46 Ga.App. 458, 167 S.E. 782 (1933). The validity of the devise of personality located in Georgia is governed by the laws of the country or state in which the testator was a resident at the time of his death. O.C.G.A. § 53-3-43; *Blackwell v. Grant*, 46 Ga.App. 241, 167 S.E. 333 (1933). Finally, in the event that the estate is insolvent, there are well developed rules determining the nature and priority of the distribution of the decedent's assets to his creditors and heirs. *See e.g.*, O.C.G.A. §§ 53-4-1 to -54, 5-1 to -21, 7-70 to -107; see also, Uniform Probate Code, §§ 2-101 to -404, 2-601 to -902, 3-801 to -816, 3-901 to -916, 4-101 to -401. The Eleventh Circuit's decision to usurp or preempt the jurisdiction of the state courts, who work within these clear guidelines, in favor of bankruptcy courts, who have no rules to look to for guidance, is such a departure from the well established judicial approach to the administration of decedents' estates that it certainly requires review by this Court.

Despite the fact that the Kaussen estate has been found to be insolvent by a West German court, it remains a decedent's estate. Merely declaring the decedent's estate insolvent and titling the proceeding a "bankruptcy" does not alter its fundamental character. To require abandonment of well established procedural and substantive guidelines formulated and administered by state probate courts in favor of a previously unknown and presently untested proceeding in the bankruptcy court seemingly defies logic.

If the decision of the Eleventh Circuit is not reversed, then it seems that separate proceedings must be filed in bankruptcy courts in each of the states where property of the decedent is located (i.e., Georgia and California). 28 U.S.C. § 1410 (venue of cases ancillary to foreign proceedings). Each of these courts will be required to determine such fundamental issues as whether West German law or the various states' laws control the disposition of the United States assets of the Kaussen estate. In addition to resolving the differences between West Germany and the United States, each of the bankruptcy courts will be required to resolve inconsistences between the federal bankruptcy laws and state probate laws. While § 304(c)(4) may be read as requiring that proceeds of a foreign decedent's estate be distributed in accordance with the priorities established by bankruptcy law, state laws have separate rules for distribution. These differences in such critical areas make an ancillary administration of a decedent's estate in the bankruptcy court practically infeasible. For example, the issues of year's support, lien priorities, administrative expenses, etc., are virtually irreconcilable within the context of these two competing sets of priorities and rules of distribution governing the various parties' rights in the assets of the estate.

The mischief of such a result is emphasized by the practical realization that an administration of the Kaussen estate by the bankruptcy court serves no real purpose. It does not result in judicial economy and most of the critical questions associated with the administration of the estate will be resolved with each decision being one of first impression. Hence, rather than promoting the orderly administration of this estate, the Eleventh Circuit's decision compounds the complexity of this action.

This Court has made it clear that the federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by statute, with due regard for the rightful independence of state gov-

ernments. *See, e.g., City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63, 62 S.Ct. 15, 76-77, 86 L.Ed. 47, 54 (1941), rehearing denied *Chase Nat. Bank of City of New York v. Indianapolis Gas Co.*, 314 U.S. 714, 62 S.Ct. 355, 86 L.Ed. 569, and three cases 314 U.S. 714, 62 S.Ct. 356, 86 L.Ed. 569; *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248, 1254 (1933). And, as pointed out above, in the wake of the *Marathon Pipeline* decision, supra, Congress clearly directed bankruptcy courts not to adjudicate state law claims related to cases under Title 11. *See*, 28 U.S.C. § 1334. The careful attention of this Court and of Congress to the interests of the various states in the adjudication of traditional state law issues is obviously inconsistent with the Eleventh Circuit's decision to disturb or divest state probate jurisdiction over the ancillary administration of foreign decedents' estates. Such a departure from long standing judicial practice and procedure requires review by this Court.

III. The Decision Of The Eleventh Circuit Concerns An Important Federal Question Having Profound Precedential Implications.

In determining whether to grant this petition, it is essential that this Court recognize that, absent reversal, the Eleventh Circuit's decision in this case may have a profound impact upon judicial administration in the United States. In short, it appears that the Eleventh Circuit may have opened the federal bankruptcy courts to *all* foreign decedents' estates. If the "foreign representative" does not have to be a "debtor" in order to file a § 304 Petition, then *any* representative of a foreign decedent's estate may be able to choose to invoke the jurisdiction of federal bankruptcy courts rather than proceeding with state probate administration.

If the Eleventh Circuit is correct that a party need not be a "debtor" in order to file a § 304 Petition, then the focus of the applicability of § 304 shifts to an inquiry

regarding the nature of the foreign proceeding. While the Eleventh Circuit has presumed that § 304 was intended to apply only to foreign insolvency proceedings, there is nothing in the Bankruptcy Code (or the legislative history of § 304) that supports this conclusion. To the contrary, the Bankruptcy Code definition of "foreign proceeding" expressly states that it is *not limited* to proceedings commenced pursuant to foreign bankruptcy law. 11 U.S.C. § 101(22). In essence, a "foreign proceeding" encompasses any foreign judicial or administrative proceeding "for the purpose of *liquidating an estate*, adjusting debts by composition, extension, or discharge, *or* effecting a reorganization." (Emphasis added.) *Id.* There is no requirement of insolvency.

Because the very essence of probate is "the liquidation of an estate," it follows that *any* foreign probate proceeding falls within the definition of "foreign proceeding." Consequently, if the Eleventh Circuit's conclusion that a "debtor" is not required for a proceeding pursuant to § 304 is correct, then it seems that *any* representative of a foreign decedent's estate may invoke the jurisdiction of the federal bankruptcy court.

If this assertion is correct, then the decision of the Eleventh Circuit has potentially rendered meaningless the well developed state laws regarding the administration of foreign decedents' estates while, at the same time, creating federal probate jurisdiction over the United States assets of foreign decedents. The far reaching implications of such a result merit review by this Court.

CONCLUSION

By concluding that a foreign decedent's estate may invoke the jurisdiction of federal bankruptcy courts, the Eleventh Circuit has extended federal jurisdiction far beyond well established limits. The decision is contrary to the intent of Congress in enacting § 304 of the United States Bankruptcy Code. Further, the decision represents

a significant departure from the traditional distinctions between the roles of federal and state judiciaries in probate matters. Finally, the precedential implications of the Eleventh Circuit's decision are profound in that any foreign decedent's estate might seek to have the United States assets of the estate administered by bankruptcy courts. For each of these reasons, this Court should review the Eleventh Circuit's decision.

WHEREFORE, Petitioner Edgardo L. Parungao prays that this Petition be granted and a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8161

IN RE KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

v.

EDGARDO L. PARUNGAO,
Defendant-Appellee.

May 18, 1988

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON,* District Judge.

TJOFLAT, Circuit Judge:

This appeal presents a question of first impression for this court: whether section 304 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, opens United States bankruptcy

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* Honorable U.W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

courts to proceedings ancillary to foreign insolvency proceedings where the entity that is the subject of the foreign proceeding qualifies for insolvency administration under foreign law, but does not fall within the Bankruptcy Code's definition of "debtor." Both the bankruptcy court and the district court in this case answered the question in the negative, holding that a West German bankruptcy trustee was precluded from commencing a section 304 ancillary case because the debtor in the foreign case—an insolvent decedent's estate—did not qualify as a "debtor" under the Bankruptcy Code. We conclude that the courts below misconstrued the eligibility requirements for section 304 relief, and we accordingly reverse.

I.

Heinz Guenter Kaussen, a resident and citizen of the Federal Republic of Germany (West Germany), died in April 1985 owning substantial property in both Europe and North America. Although most of his holdings were located in West Germany, he also owned property in Canada, Ireland, California, and Georgia. At the time of his death, his liabilities exceeded the value of his assets by some $55 million. His business enterprises had been headquartered in Cologne, West Germany, and the vast majority of the estate's creditors are located in West Germany.

Shortly after Kaussen's death, probate proceedings were commenced in the local court of Cologne. That court appointed an administrator who, after determining that the estate was insolvent, petitioned the court to commence bankruptcy proceedings.[1] On January 24, 1986, the court

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[1] West German law, like the law in many other foreign countries, permits bankruptcy proceedings to be brought with respect to insolvent decedents' estates. *See* Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 & n. 223 (1985); Nadelmann, *Insolvent Decedents' Estates*, 49 Mich.L.Rev. 1129, 1129 (1951).

entered an Order of Adjudication, finding that the estate was insolvent. The court appointed Klaus Hubert Goerg, appellant here, to serve as the bankruptcy trustee and authorized him to take possession of the decedent's property both in Germany and abroad. The adjudication of bankruptcy and the appointment of Goerg as trustee were affirmed by the Cologne Regional Court and the Cologne Higher Court of Appeals. The Higher Court of Appeals specifically held that "[i]n addition to the domestic property, the Debtor's bankruptcy estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee." [2]

Meanwhile, upon Kaussen's death, the Probate Court of Fulton County, Georgia has appointed Edgardo L. Parungao, appellee here, to serve as administrator of the Kaussen estate assets located in Georgia.[3] In June 1986, Goerg filed a petition pursuant to 11 U.S.C. § 304 (1982) in the United States Bankruptcy Court for the Northern District of Georgia, seeking to enjoin Parungao from prosecuting the Fulton County probate proceeding.[4] Under section 304, a United States bankruptcy court may, upon petition by the official representative of a foreign bankrupt in a foreign insolvency proceeding, enter an order staying the commencement or continuation of any action in the United States against property involved in the for-

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[2] Appellant represents, and appellee does not dispute, that the Cologne Higher Regional Court of Appeals is the highest court of review with respect to matters involving insolvent decedents' estates.

[3] Under Georgia law, the probate court of the county in which a nonresident decedent's real property is located has jurisdiction over the administration of that property. *See Hungerford v. Spalding*, 183 Ga. 547, 189 S.E. 2, 3 (1936).

[4] The bankruptcy court reported that "[u]nder a settlement approved by Superior Court of Fulton County, Georgia and the Probate Court of Fulton County, Georgia, distributions from the estate are to be paid 20% to each of Kaussen's four children and Mrs. Ingelborg Skowronek, mother of the children and Kaussen's lifetime companion."

eign proceeding. *Id.* § 304(b)(1)(A). The bankruptcy court may also stay the enforcement of any lien or judgment obtained against such property, *id.* § 304(b)(1)(B), and may order that such property be turned over for administration by the foreign court in which the principal bankruptcy case is pending. *Id.* § 304(b)(2). Finally, the bankruptcy court may order other relief deemed "appropriate." *Id.* § 304(b)(3). In his section 304 petition, Goerg requested the bankruptcy court to order that the Georgia property be turned over to him for distribution in the West German bankruptcy proceeding.

Based on its interpretation of the language of section 304 and the pertinent definitional sections, the bankruptcy court held that its jurisdiction to entertain section 304 petitions was limited to cases in which the subject of the foreign insolvency proceeding qualified as a "debtor" as that term is defined in the Bankruptcy Code. The bankruptcy court then concluded that an insolvent decendent's estate—the debtor in the foreign insolvency proceeding in this case—did not qualify as a "debtor" under the Code. Accordingly, the bankruptcy court dismissed Goerg's section 304 petition for lack of subject matter jurisdiction.[5]

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[5] Although it felt compelled by the statutory language to dismiss the petition, the bankruptcy court expressed dismay at the outcome:

> Here we have German nationals [i.e., Mrs. Skowronek and Kaussen's four children, *see supra* note 4] who have lost their appeals to assert their interests in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia. In Georgia, they will receive what they could not from their own home courts. . . . As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur.

64 BR 321. The district court affirmed, and Goerg now appeals.

II.

Section 304 provides as follows:

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a debtor with respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.
>
> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be

guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304 (1982).

In holding that it lacked jurisdiction to entertain Goerg's section 304 petition, the bankruptcy court engaged in the following analysis. First, it looked to the Code's definition of "foreign proceeding":

> "[F]oreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

Id. § 101(22) (Supp. IV 1986). Because the definition of "foreign proceeding" makes reference to "the *debtor's*

domicile, residence, principal place of business, or principal assets," the bankruptcy court concluded that its jurisdiction to entertain section 304 petitions was limited to cases in which the subject of the foreign proceeding qualified as a "debtor" under the Code.[6] The Code defines a "debtor" as a "person or municipality concerning which a case under this title has been commenced." *Id.* § 101(12) (1982). "Person," under the Code, "includes individual, partnership, and corporation, but does not include governmental unit." *Id.* § 101(35) (Supp. IV 1986). The bankruptcy court held that an insolvent decedent's estate is not a "person," and therefore not a "debtor," and that the court was consequently without jurisdiction to entertain Goerg's petition.

In evaluating the correctness of the bankruptcy court's ruling, our first task is to determine whether, as a general matter, the Code's definition of "debtor" excludes insolvent decedents' estates. If we conclude that it does, our task will then be to decide whether that exclusion applies in the context of a section 304 ancillary proceeding.

Before we begin our analysis, we note that Congress has the *power* to create bankruptcy jurisdiction over the administration of decedents' estates. U.S. Const. art. I, § 8, cl. 4.[7] Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception relates only to 28 U.S.C.

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[6] As support for its holding, the bankruptcy court cited *Angulo v. Kedzep Ltd.*, 29 B.R. 417 (S.D.Tex. 1983). In the course of discussing whether the foreign representative in that case had met the threshold prerequisites for application of section 304, the *Angulo* court stated that the foreign debtor "could be a debtor under Chapter 11." *Id.* at 418.

[7] Clause 4 provides that Congress shall have power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

§ 1332 (1982),[8] and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases. *Cf. Covell v. Heyman*, 111 U.S. 176, 179-80, 4 S.Ct. 355, 357, 28 L.Ed. 390 (1884) (property in custody of state court may be disturbed by federal court "exercis[ing] jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States"). Owing to the supremacy clause, federal bankruptcy law preempts state law; as one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the Constitution. *Cf. Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-02, 55 S.Ct. 854, 863, 869, 79 L.Ed. 1593 (1935). Whether Congress has actually exercised its bankruptcy power in a particular area is, of course, a matter of statutory construction.

Having said that, we turn to the question whether the Code's definition of "debtor" excludes decedents' estates. As the bankruptcy court correctly observed, the term "debtor" as defined by the Code means "person or municipality," and the term "person" "includes individual, partnership and corporation, but does not include governmental unit." Notably, the Code does not *exclude* decedents' estates from the definition of "person"; Congress' use of the word "includes" in the definition of "person" means that the definition is not limiting. *See* 11 U.S.C. § 102(3) (1982) (rules of construction).

Nevertheless, we find two indicia that Congress intended to exclude insolvent decedents' estates from the definition of "person." First, Congress defined "entity" to include "person, estate, trust, governmental unit, and

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[8] The "probate exception" was developed at a time when the diversity statute granted jurisdiction over "suits of a civil nature in law or equity." Probate matters were deemed not to fit this description because such actions would have been heard in the ecclesiastical courts. *See* C. Wright, Law of Federal Courts § 25, at 143-46 (4th ed. 1983).

United States trustee." *Id.* § 101(14) (Supp. IV 1986). If Congress had intended "person" to include "estate," there would have been no reason to list "estate" separately in the definition of "entity." Second, the legislative history expressly states that "[t]he definition [of person] does not include an estate or a trust." H.R. Rep. No. 595, 95th Cong., 2d Sess. 313, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270; S. Rep. No. 989, 95th Cong., 2d Sess. 25, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5811.

Based on these indicia, we conclude that the Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates. Other courts that have addressed this question have uniformly embraced this view. *See In re Estate of Whiteside*, 64 B.R. 99, 102 (Bankr. E.D. Cal. 1986); *In re Estate of Patterson*, 64 B.R. 807, 808 (Bankr. W.D. Tex. 1986); *In re Jarrett*, 19 B.R. 413, 414 (Bankr. M.D. N.C. 1982); *In re 299 Jack-Hemp Assocs.*, 20 B.R. 412, 413 (Bankr. S.D.N.Y. 1982); *In re Estate of Brown*, 16 B.R. 128, 128 (Bankr. D.D.C. 1981).[9] These courts generally have opined that Congress elected not to extend bankruptcy jurisdiction to insolvent decedents' estates because the individual states have developed, through their probate systems, a comprehensive and specialized machinery for the administration of such estates. *See Jarrett*, 19 B.R. at 414, *299 Jack-Hemp Assocs.*, 20 B.R.

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[9] Courts addressing the issue under the predecessor of the current Bankruptcy Code, the 1898 Bankruptcy Act, reached the same conclusion. *See In re Estate of Hiller*, 240 F.Supp. 504, 504 (N.D. Cal. 1965); *In re Morgan*, 26 F.2d 90, 91 (D.Mass. 1928); *In re Fackelman*, 248 F. 565, 568 (S.D.Cal. 1918); *see also Adams v. Terrell*, 4 F. 796, 801 (W.D.Tex. 1880) (interpreting predecessor of 1898 Act). During the process leading to the enactment of the present Bankruptcy Code, the Commission on the Bankruptcy Laws recommended that the traditional exclusion of decedents' estates be continued. *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I, at 185 (1973).

at 413. Some of the courts have also noted that the policy of the Bankruptcy Code is to give individuals a "fresh start" through discharge of their debts, and that this policy is not furthered by bankruptcy administration of decedents' estates. *See Jarrett*, 19 B.R. at 414; *cf. In re Estate of Hiller*, 240 F. Supp. 504, 504 (N.D. Cal. 1965) (interpreting 1898 Bankruptcy Act); *Adams v. Terrel*, 4 F. 796, 801 (W.D. Tex. 1880) (in the case of an insolvent decedent's estate, "death has already discharged [the decedent] of all personal liability").

As we indicated above, however, our conclusion that the Code's definition of "debtor" excludes decedents' estates does not end our inquiry: we must now determine whether that exclusion applies in the context of a proceeding ancillary to a foreign proceeding pursuant to section 304. As the bankruptcy court emphasized, the Code's definition of "foreign proceeding" does make reference to "the debtor."[10] However, that same definition states that "'foreign proceeding' means proceeding . . . *whether or not under bankruptcy law* . . . for the purpose of *liquidating an estate*, adjusting debts by composition, extension, or discharge, or effecting a reorganization." 11 U.S.C. § 101(22) (Supp. IV 1986) (emphasis added). Thus, we are presented with an anomaly: although the inclusion of the term "debtor" in the definition of "foreign proceeding" suggests that the subject of the foreign proceeding must qualify as a "debtor" under United States bankruptcy law, the Code expressly provides that the foreign proceeding need not even be a bankruptcy proceeding, either under foreign or United States law. Moreover, "foreign proceeding" includes a proceeding "for the purpose of liquidating an estate"[11]—

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[10] We note that the text of section 304 itself also contains the term "debtor."

[11] The term "estate" is not defined in the definitional section of the Bankruptcy Code. The Code does use the term of art "property of the state" to describe "all legal or equitable interests of the

yet, as we have seen, a decedent's estate does not qualify as a "debtor" under United States bankruptcy law.

The anomaly created by the inclusion of the term "debtor" in the otherwise expansive definition of "foreign proceeding" could be resolved in either one of two ways. First, we could adopt the position taken by the bankruptcy court: that the Code's narrow definition of "debtor" controls, notwithstanding the otherwise expansive definition of "foreign proceeding." Alternatively, we could adopt the view that the term "debtor" as used in the section 304 context incorporates the definition of "debtor" used by the forum in which the foreign proceeding is pending. Under this alternative view, the bankruptcy court has jurisdiction to entertain the section 304 petition provided that the debtor qualifies for relief under applicable foreign law, and provided further that the foreign proceeding to which the debtor is subject is "for the purpose of liquidating an estate. adjusting debts by composition, extension, or discharge, or effecting a reorganization."

At first blush, the former view seems the more attractive of the two; the term "debtor" is expressly defined by the Code, and general principles of statutory construction require us to assume that Congress intended that the definition apply each time the term appears. However, it is also a well established canon of statutory con-

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debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982). However, the Code also uses the term "estate" in a sense that includes decedent's estates. *See id.* § 101(14) (Supp. IV 1986) (definition of "entity"). The use of the term "estate" in the definition of "foreign proceeding" is ambiguous, and could be interpreted as including insolvent decedent's estates, not just "estates" in the sense of the bankruptcy term of art "property of the estate." *See* 2 Collier on Bankruptcy ¶ 304.01, at 304-12 (15th ed. 1987) ("That a foreign administration of a decedent's estate is . . . a 'foreign proceeding' is suggested by the expansive language of [section 101(22)] which includes within its scope proceedings under laws other than bankruptcy laws brought for the purpose of liquidating an estate.").

struction that "[a] statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 65 (5th Cir. 1970). Because we find that the question of debtor eligibility for section 304 ancillary assistance is susceptible of two interpretations, we turn to an examination of the purposes behind section 304.

Section 304, which was enacted as part of the Bankruptcy Reform Act of 1978 and which had no predecessor in prior law,[12] "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings." *Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454 (2d Cir. 1985); *see generally* Unger, *United States Recognition of Foreign Bankruptcies*, 19 Int'l Law. 1153 (1985). The filing of a section 304 petition does not commence a full bankruptcy case; a section 304 case is an ancillary case in which a United States bankruptcy court is authorized to apply its processes to give effect to orders entered in a foreign insolvency proceeding. Consistent with "[p]rinciples of international comity and respect for the judgments and laws of other nations," Congress intended that the bankruptcy courts have "maximum flexibility" in

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[12] *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. II, 69-71 (1973); *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 1443 (1976) (statement of Professor Kurt H. Nadelmann). Under section 2a(22) of the 1898 Bankruptcy Act, bankruptcy courts were authorized to "[e]xercise, withhold, or suspend the exercise of jurisdiction . . . where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States." Although the 1898 Act did not provide a mechanism whereby a foreign bankruptcy trustee could initiate a proceeding in a United States bankruptcy court, some United States courts did defer to foreign insolvency administrations as a matter of comity. *See, e.g., Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F.Supp. 1255, 1259 (S.D.N.Y.), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

fashioning appropriate orders. H.R. Rep. No. 595, 95th Cong., 2d Sess. 325, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6281. The ultimate purpose of the section 304 mechanism is to "prevent dismemberment by local creditors" of assets located in this country that are involved in a foreign insolvency proceeding. *Id.* at 324; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code & Admin. News 5787, 5821.

It is thus clear that Congress enacted section 304 to help further the efficiency of foreign insolvency proceedings involving worldwide assets. In aid of such proceedings, federal bankruptcy courts may, within the constraints imposed by section 304, apply their processes and expertise to marshall property of the foreign debtor's estate located in this country. Because the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law. *See* Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 Int'l & Comp. L.Q. 729, 740-41 (1987); Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 (1985). Indeed, in light of the comity concerns that induced Congress to enact section 304, it would make emient sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available.

It bears emphasizing that a section 304 debtor does not receive the benefits of full bankruptcy administration under United States law. The legislative history expressly states that the filing of a section 304 petition "does not commence a full bankruptcy case." H.R. Rep. No. 595, 95th Cong., 2d Sess. 324, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6281; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5821. Thus, for example,

the debtor is not entitled to the automatic stay under 11 U.S.C. § 362 (1982), nor is the debtor entitled to a discharge of its debts upon completion of the section 304 proceeding. Indeed, the section 304 debtor may ultimately receive no relief at all; it is within the discretion of the bankruptcy court, guided by the factors enumerated in section 304(c), to determine what relief, if any, is appropriate. That the section 304 debtor is denied the two main benefits accorded the debtor in a full bankruptcy proceeding—automatic stay and discharge—strongly suggests that Congress did not intended that "debtor" eligibility under the Code be a prerequisite to section 304 ancillary assistance.[13]

In light of these considerations, we conclude that the debtor in a section 304 proceeding need not qualify as a "debtor" under the Code's definition of that term. Rather, the debtor need only be properly subject, under applicable foreign law, to a proceeding commenced "for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." Because that condition is met in this case, we reverse and remand with instructions that the bankruptcy court entertain Goerg's section 304 petition.[14]

REVERSED and REMANDED.

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[13] This analysis suggests that a full bankruptcy proceeding involving a foreign debtor may be commenced only if the foreign debtor qualifies as a "debtor" under the Code *Cf.* 11 U.S.C. § 303 (b)(4) (1982).

[14] The record is not clear as to whether the bankruptcy court has passed on all issues relevant to its jurisdiction to entertain Goerg's section 304 petition. In addition to establishing debtor eligibility, the section 304 petition must establish (1) a foreign proceeding against the debtor, (2) a foreign representative entitled to file the petition, and (3) presence within the district of property involved in the foreign proceeding. *See In re Stuppel*, 17 B.R. 413 (S.D.Fla. 1981). On remand, the bankruptcy court should dismiss the petition unless it finds that each of these elements has been established.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C-86-2096-A

IN RE: KLAUS HUBERT GOERG, Trustee in bankruptry under the laws of the Federal Republic of Germany for the estate of Heinz Guenter Kaussen,

Appellant

[Filed Jan. 8, 1987]

ORDER

This appeal is from the decision of the bankruptcy court finding that the bankruptcy court lacked subject matter jurisdiction in this case.

In April of 1985, Heinz Guenter Kaussen, a citizen of the Federal Republic of Germany, died. After determining that the estate was insolvent, the German probate administrator petitioned the Cologne local court to commence bankruptcy proceedings. On January 24, 1986, the Cologne court entered an Order of Adjudication findings that the estate was insolvent and appointing Klaus Hubert Goerg as bankruptcy trustee. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the District Court of Cologne pursuant to section 215 of the Konkursordnung (the German Bankruptcy Act). Kaussen owned real and personal property located in Germany, Canada, Ireland, California, and Georgia. At the time of his death, Kaussen's liabilities exceeded the value of his assets by more than 55 million dollars. The vast majority of creditors of the estate are located in Germany where most of Kaussen's holdings are located.

The Cologne local court's Order of Adjudication giving Goerg authority to liquidate all of Kaussen's property both within Germany and abroad was affirmed by the Cologne Regional Court on February 17, 1986 and by the Cologne Higher Regional Court of Appeals on March 3, 1986 and April 28, 1986. The latter court is the highest court of review available under German law.

Pursuant to the Order of Adjudication and 11 U.S.C. § 304, Goerg filed proceedings in the bankruptcy court for the Northern District of Georgia to liquidate the assets located in this district. Concurrently with the bankruptcy proceedings in Germany, the Fulton County Probate Court appointed Edgardo L. Parungao as the administrator of Kaussen's assets located in Georgia. Parungao moved the bankruptcy court to dismiss Goerg's proceeding in that court on several grounds. The bankruptcy court granted Parungao's motion finding that it lacked jurisdiction over the subject matter.

Appellant Goerg appeals that decision of the bankruptcy court. Appellant contends that a foreign bankruptcy trustee is a foreign representative qualified to initiate a case ancillary to a foreign proceeding under 11 U.S.C. § 304, whether or not the foreign debtor was deceased at the time of the commencement of the foreign proceeding.

Although this appears to be a case of first impression in this circuit, the controlling issue has been dealt with by other courts and in the treatise *Collier on Bankruptcy*. 2 *Collier on Bankruptcy* ¶ 304.01 at 304-12 (15th ed. 1986). *See also Angulo v. Kedzep*, 29 Bankr. 417, 418 (Bankr. S.D. Tex. 1983). The controlling issue is "whether section 304 opens United States bankruptcy courts to proceedings ancillary to foreign administration under foreign law but not ordinarily qualifying for relief under the [Bankruptcy] Code." *Id.* at 304-11. Germany as well as many other foreign countries permit bankruptcy proceedings to be brought with respect to in-

solvent decedents' estates even if the petition for bankruptcy is filed after the decedent's death. United States bankruptcy laws, however, consistently have been construed not to cover bankruptcy proceedings initiated by representatives of decedents. *See, e.g., In re Estate of Hiller*, 240 F. Supp. 504 (N.D. Cal. 1965).

Section 304 of the Bankruptcy Code provides:

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a *debtor* will respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against the *debtor* with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.
>
> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be

guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate:

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

An ancillary case may be brought only in connection with a foreign proceeding. Appellant urges this court to find that the foreign administration of a decedent's estate is a "foreign proceeding" as is required by section 304 and as that term is defined by 11 U.S.C. § 101(20) (Supp. 1986). The definition given in the statute for a "foreign proceeding" is a

proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the *debtor's* domicile, residence, principal place of business, or principal assets were located at the commencement of such proceedings for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

Id.

This court finds that the bankruptcy court properly concluded that section 304 requires a "debtor" before a court can exercise jurisdiction pursuant to that section. Debtor is defined in the Bankruptcy Code as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(12) (1982). The definition of "person" under the Code "includes individual, partnership, and corporation," but does not include a decedents' estate. 11 U.S.C. § 101(33) (Supp. 1986). Thus, the definition of debtor does not include a decedent's estate. *See, e.g., In re Jarrett*, 19 Bankr. 413 (Bankr. M.D.N.C. 1982); *In re Brown*, 16 Bankr. 128 (Bankr.D.D.C. 1981). For this reason, although Goerg is a "foreign representative" as is required by section 304, the estate of Kaussen is not a debtor as is contemplated under that section and 11 U.S.C. § 101(20); therefore, the bankruptcy court does not have jurisdiction to hear a case concerning the estate of Kaussen that is ancillary to a foreign proceeding concerning that estate.

The bankruptcy court properly found that by excluding probate estates from the definition of debtor, Congress made a deliberate choice to allow the state probate systems to dispose of property in an insolvent decedent's estate. It seems unlikely that Congress would exclude American decedent's estates from the bankruptcy code but allow foreign decedent's estates to be protected. The Fulton County Probate Court has exclusive jurisdiction over property located in Georgia which constitutes part of the Kaussen estate. For these reasons, the bankruptcy court properly deferred to the state probate system to allow the Fulton County Probate Court to dispose of Kaussen's assets located in Georgia.

Accordingly, this court affirms the bankruptcy court's order granting Parungao's motion to dismiss.

IT IS SO ORDERED this 8th day of January, 1987.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

---

[1] When a nonresident decedent has property or a cause of action in more than one county, letters of administration may be granted in any county in which such property or cause of action is located. The judge of the probate court who first grants such letters acquires exclusive jurisdiction.

O.C.G.A. § 15-9-32 (1985).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Docket Number C86-2096

William C. O'Kelley
United States District Judge

KLAUS HUBERT GOERG

v.

EDGARDO L. PARUNGAO

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED

AFFIRMING bankruptcy court's order granting EDGARDO L. PARUNGAO's motion to dismiss.

Filed January 13, 1987

LUTHER D. THOMAS
Clerk

/s/ Pat [Illegible]
(By Deputy Clerk)

UNITED STATES BANKRUPTCY COURT
N.D. GEORGIA
ATLANTA DIVISION

Bankruptcy No. A86-04341-ADK

IN THE MATTER OF KLAUS HUBERT GOERG, as Trustee in Bankruptcy under the laws of the Federal Republic of Germany for the Estate of Heinz Guenter Kaussen Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304.

Aug. 26, 1986

Robert Goldstein, Kilpatrick & Cody, Atlanta, Ga., for petitioner.

Robert E. Hicks, Hicks, Maloof & Campbell, Atlanta, Ga., for respondent.

MEMORANDUM OF OPINION AND ORDER

A.D. KAHN, Bankruptcy Judge.

The above-styled proceeding was filed by Klaus Hubert Goerg [hereinafter referred to as "Petitioner"], the bankruptcy trustee of the estate of Heinz Guenter Kaussen appointed under the Laws of the Federal Republic of Germany, petitioning this Court for ancillary administration pursuant to 11 U.S.C. § 304. It is before the Court on a Motion to Dismiss filed by Edgardo L. Parungao [hereinafter referred to as "Movant"], the administrator of the estate of Heinz Guenter Kaussen appointed by the Probate Court of Fulton County, Georgia. Movant

contends that the instant proceeding should be dismissed for the following reasons: 1) that the Court lacks jurisdiction over the subject matter; 2) that the Court lacks jurisdiction over the person; 3) that the Petition fails to state a claim upon which relief can be granted; 4) that the Petition fails to join necessary parties; and 5) that this Court should abstain from exercising jurisdiction pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 305. The Court finds it necessary to address only the first of these grounds.

The instant Petition calls upon this Court to exercise jurisdiction over assets of the estate of Heinz Guenter Kaussen located in the Northern District of Georgia. Kaussen, a citizen of the Federal Republic of Germany, died in April of 1985. After determining that the estate was insolvent, the German probate administrator petitioned the Cologne Local Court to commence bankruptcy proceedings for the purpose of liquidating the estate. An Order of Adjudication determining that the estate was insolvent and appointing Petitioner herein as the bankruptcy trustee was entered by the Cologne Local Court on January 24, 1986. *See* Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss at Tab 1. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the Cologne Local Court, pursuant to Section 215 of the Konkursordnung (Section 215 of the German Bankruptcy Act). The Order of Adjudication was affirmed on appeal by the Cologne Regional Court on February 17, 1986 and by the Cologne Higher Regional Court of Appeals on March 3, 1986 and April 28, 1986.

> The Cologne Local Court stated that Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings.

Order of Cologne Local Court entered January 24, 1986 at 2 contained in Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss, Tab. 1.

In its Decree of April 28, 1896, [sic] the Cologne Higher Regional Court of Appeals stated that

> The dispute as to whether the so-called principle of territoriality or the so-called principle of universality shall prevail in the bankruptcy proceedings, i.e., whether the bankruptcy commenced in the Federal Republic encompasses the entire property of the Debtor—irrespective of its situs—, was in recent rulings of the Federal Court of Justice ruled on in favor of the principle of universality, which the Division of Civil Matters of this Court agrees with . . . This means: In addition to the domestic property, the Debtor's bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee . . . Any duties of the Debtor in handling the bankruptcy proceedings shall therefore include the property located abroad.
>
> * * * *
>
> A further legal consequence is derived from the above in that the rights of the heiress or any other person authorized to dispose of the property constituting part of the estate has expired, which includes the property located abroad.

Decree of the Cologne Higher Regional Court of Appeals dated April 28, 1986 at 2-3, 5 contained in Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss, Tab 4. It appears that the Cologne Higher Regional Court of Appeals is the highest Court of review available under German law. Petition at ¶ 6.

Thus, against this background, Petitioner filed the instant proceeding to enforce here the liquidation proceedings in Germany. Apparently concurrently with the German bankruptcy proceedings, Movant was appointed by the Probate Court of Fulton County, Georgia as administrator of Kaussen's local estate. Movant is a German national who was a close associate of Kaussen. Kaussen's heirs at the time of his death were also citizens of the Federal Republic of Germany. Movant asks this Court to dismiss this proceeding so that the proceedings in the Probate Court of Fulton County may go forward. It appears that despite the holdings of the German Courts, Kaussen's heirs will receive property from the estate within the jurisdiction of the Probate Court.*

Section 304 of the Bankruptcy Code provides that

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—

---

* Under a settlement approved by Superior Court of Fulton County, Georgia and the Probate Court of Fulton County, Georgia, distributions from the estate are to be paid 20% to each of Kaussen's four children and Mrs. Ingelborg Skowronek, mother of the children and Kaussen's lifetime companion. "Order Approving Agreement of Settlement and Compromise Concerning the Will of Guenter Kaussen under the Laws of Georgia" filed July 17, 1985 in Superior Court of Fulton County, Georgia, attached as Exhibit A to Motion for Appointment of Guardian Ad Litem.

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief. (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

In applying § 304, the Court must first examine whether Petitioner is "foreign representative" in a

"foreign proceeding." Section 101(21) defines "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." Section 101(20) defines "foreign proceeding as a

> proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

This definition makes reference to the "debtor's domicile. . . ."

The term "debtor" is defined in § 101(12) as a "person or municipality concerning which a case under this title has been commenced." "Person" is defined in § 101 (33) as including "individual, partnership and corporation, but does not include governmental unit. . . ."

Section 109(a) of the Bankruptcy Code sets out who may be a debtor under Title 11 and provides that "[n]otwithstanding any other provision of this section, only a *person* that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." It is well established that a probate estate is not a "person" within the meaning of the Bankruptcy Code. *In re Brown*, 16 B.R. 128 (Bankr. D. D.C. 1981). *See also In re Jarrett*, 19 B.R. 413 (Bankr. M.D. N.C. 1982). Therefore, unlike the laws of the Federal Republic of Germany, the estate of Kaussen is ineligible for relief under the bankruptcy laws of the United States.

It is clear, however, that a petition pursuant to § 304 does not commence a "case" under Title 11. The legislative history states that

> [t]his section governs cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, the foreign representative may file a petition under this section, *which does not commence a full bankruptcy case*, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief. The debtor is given the opportunity to controvert the petition.

Report of the Committee on the Judiciary, S. Rep. No. 989, 95th Cong., 2nd Sess. 35 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5821. The question then becomes must there be a "debtor" within the meaning of the Bankruptcy Code in order to invoke the jurisdiction of this Court through § 304?

The Court has carefully considered the briefs submitted by the Parties on this issue. From the facts before the Court, there are very strong reasons to exercise jurisdiction for the sake of comity. Here we have German nationals, who have lost their appeals to assert their interests in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia. In Georgia, they will receive what they could not from their own home courts.

On the other hand, the Court must work within the Bankruptcy Code as it is written. A methodical examination of the definitions provided in the Code leads the Court to the unavoidable conclusion that one must qualify to be a "debtor" under the Code before this Court can exercise its jurisdiction pursuant to § 304. In the United States, each state has a system for liquidating and disposing of the estates of deceased persons. This includes those of United States citizens as well as those of foreign nationals. By not including probate estates as entities eligible for relief under the Bankruptcy Code, Congress

deliberately chose these state systems for disposing of property in probate estates over the national bankruptcy system provided for in the Code. The Court is unable to find any authority to demonstrate that Congress intended to make an exception for foreign probate estates.

In addition to the lack of any positive statement from Congress, determination of eligibility requirements of § 304 is further complicated by the paucity of cases regarding this section. A few cases focus on the application of the factors listed in § 304(c). *See, e.g., In re Toga Mfg. Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). Two courts have stated or, at least assumed that, the existence of a "debtor" under the Bankruptcy Code was a prerequisite to relief under § 304. In *Angulo v. Kedzep, Ltd.*, 29 B.R. 417 (S.D. Tex. 1983), the Court concluded that because it was shown that Kedzep could be a debtor under Chapter 11 of the Bankruptcy Code, the Trustee had "met the threshold prerequisites for application of section 304." 29 B.R. at 418. The Court in *Universal Casualty & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985), held that only the requirement of § 109(a) must be satisfied in order to qualify for relief under § 304. Section 109(a) provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."

The treatise *Collier on Bankruptcy* discusses the very issue before the Court and questions whether jurisdiction can be exercised pursuant to § 304 under these circumstances.

> [T]hat a foreign administration of a decedent's estate *is not* a "foreign proceeding" under section 101(20) is suggested by the fact that both sections 101(20) and 304 refer to a "debtor," which the Code

> defines to mean a person or municipality, and a "person" under the Code does not include a decedent's estate. And at least one court has held that the threshold prerequisites for application of section 304 include a showing that the foreign debtor could be a debtor under the Code. Moreover, that Congress could have intended to exclude American decedents' estates from the protection of the Bankruptcy Code while extending that protection to foreign decedents' estates is a questionable proposition. It may also be significant that the Uniform Probate Code, which the Commission deemed adequate to cover domestic administration of insolvent decedents' estates, provides for "ancillary administration" by "foreign personal representatives."

2 *Collier on Bankruptcy* ¶ 304.01 at 304-12 (15th ed. 1986) (footnotes omitted) (emphasis in original).

In the instant proceeding, if comity was the only factor to be considered, this Court would not hesitate to exercise its jurisdiction. As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur. However, this Court is convinced that it is unable to exercise its jurisdiction to enforce the orders of the German Courts because the drafters of the Code intended that an entity must qualify to be a "debtor" under the Code before relief can be entered pursuant to § 304. It is an unfortunate result in this particular case under these particular circumstances, but, as a general policy, the Court sees the wisdom in deferring to the state court probate systems in handling decedent's estates.

ORDER

Therefore, in accordance with the reasoning above, it is the Order of the Court that the Motion to Dismiss filed by Edgardo L. Parungao be, and the same hereby is, GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8161

D.C. Docket No. 86-2096

IN RE: KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

versus

EDGARDO L. PARUNGAO,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON *, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable U. W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED with instructions that the bankruptcy court entertain Plaintiff Goerg's section 304 petition;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 18, 1988

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: Jul. 29, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8161

IN RE: KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

versus

EDGARDO L. PARUNGAO,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion May 18, 11 Cir., 1988, —— F.2d ——).

(Filed July 18, 1988)

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON,* District Judge.

PER CURIAM:

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* Honorable U. W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3-86-01940JR

IN RE PETITION OF KLAUS HUBERT GORG, [sic] as Receiver, Trustee in Bankruptcy and Foreign Representative of the Estate of Heinz-Gunter [sic] Kaussen, deceased (debtor in a Foreign Proceeding).

[Filed Aug. 15, 1986]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motion for preliminary injunction of petitioner KLAUS HUBERT GORG, [sic] Receiver, Trustee in Bankruptcy and foreign representative of the estate of Heinz-Gunter [sic] Kaussen, deceased, ("Petitioner"), came on for hearing on July 14, 1986 before the Honorable Jack Rainville, United States Bankruptcy Judge. Petitioner's motion requests that this court enjoin JAMES R. SCANNEL, Public Administrator ("Administrator"), from taking certain actions with respect to the estate of Heinz-Gunter [sic] Kaussen, aka Guenter Kaussen, deceased, Petitioner's debtor in a foreign proceeding. The court having considered the petition, the motion for preliminary injunction, and the declarations and memoranda submitted in support of said motion and in opposition thereto, and having heard oral argument in open court, and the matter having been submitted for decision, the Court hereby makes the following

FINDINGS OF FACT

1. Heinz-Gunter [sic] Kaussen, a domiciliary and citizen of the Federal Republic of Germany, died on or about April 15, 1985 in Cologne, Germany.

2. Subsequent to April 15, 1985, a probate proceeding was commenced in the Courts of the Federal Republic of Germany.

3. Upon the application of the German probate administrators, the estate of Heinz-Gunter [sic] Kaussen was declared insolvent, and Petitioner was duly appointed Receiver and Trustee in Bankruptcy with respect to said estate.

4. There is now pending in the Superior Court of the State of California for the City and County of San Francisco a probate action entitled "In the Matter of the Estate of Guenter Kaussen Deceased, No. 240596," pursuant to which Administrator has been issued Letters of Administration.

5. On July 3, 1986, Petitioner moved this court for a preliminary injunction preventing Administrator from distributing the assets of, or paying or settling claims against, the Estate of Guenter Kaussen. Petitioner's motion was made on the ground that there was a substantial likelihood that Petitioner would be granted relief pursuant to 11. [sic] U.S.C. Section 304, and that the motion would prevent irreparable harm to Petitioner pending the determination of the merits of his petition for relief.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact are conclusions of law, the same are incorporated herein.

2. The probate proceeding pending in the Federal Republic of Germany in which Petitioner was appointed

Receiver and Trustee in Bankruptcy of the estate of KAUSSEN is not a "foreign proceeding" as defined in 11 USC Section 101(20).

3. This Court has no jurisdiction over the estate of KAUSSEN, deceased, being administered in the Superior Court of the State of California, in and for the City and County of San Francisco (No. 240596), the assets of KAUSSEN, deceased, being administered therein, the Administrator to whom Letters of Administration have been issued therein, creditors' claims against the decedent asserted therein, nor persons asserting to be entitled to distribution of said estate.

4. The motion for preliminary injunction should be denied.

Dated: August 15, 1985

/s/ Jack Rainville
JACK RAINVILLE
U. S. Bankruptcy Judge

Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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112P

QUESTION PRESENTED

Does the Eleventh Circuit's construction of section 304 of the Bankruptcy Code—allowing the representative of a German bankruptcy proceeding, which involves a German decedent's estate with assets in the United States, to maintain an ancillary proceeding pursuant to section 304—so depart from precedent, Congressional intent, and the usual course of judicial administration as to demand review by this Court?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-639

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,

Petitioner,

v.

KLAUS HUBERT GOERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Factual Background.[1]

This case involves citizens of the Federal Republic of Germany ("West Germany") who have fully litigated their rights, and lost, in bankruptcy proceedings in the

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[1] Petitioner generally stated the facts correctly, but he failed to reveal what is at the heart of this case, the flagrant attempts of the heirs of Heinz Guenter Kaussen to circumvent orders entered against them by the bankruptcy courts of their homeland, the Federal Republic of Germany.

courts of their own country. These German citizens are now seeking to circumvent the orders entered against them and to relitigate issues previously decided by invoking the laws of numerous jurisdictions around the globe. At issue is the bankruptcy estate of the late Heinz Guenter Kaussen ("Kaussen"), himself a citizen and resident of West Germany until his death by suicide in 1985. The German bankruptcy estate includes substantial assets located in West Germany, Ireland, Canada, California and Georgia.

At the time of Kaussen's death, his liabilities exceeded his assets by more than 55 million dollars. On January 24, 1986, the Cologne Local Court entered an Order of Adjudication determining that the Kaussen estate was insolvent and appointing Dr. Klaus Hubert Goerg (Respondent here) as the bankruptcy trustee to liquidate the estate for the benefit of Kaussen's creditors worldwide.

The sole beneficiary of Kaussen's will, Ingeborg Skowronek, by whom Kaussen had four daughters, vigorously contested the bankruptcy petition in the West German courts, but lost in the Cologne Local Court and on several appeals.[2] The court of last resort in West Germany affirmed the order bestowing upon Dr. Goerg all powers necessary to take possession of Kaussen's assets, wherever located, and to liquidate them for the benefit of creditors. The West German courts' orders expressly pro-

[2] The Cologne Local Court's Order of Adjudication was affirmed on appeal by the Cologne Regional Court on February 17, 1986, and by the Cologne Higher Regional Court of Appeals on March 3, 1986, and April 28, 1986. These opinions are included in the Respondent's Appendix at pages 1a, 6a, 15a, and 26a, respectively. The Federal German Constitutional Court, on June 6, 1986, refused to review this matter for the reasons set forth in its opinion included at page 32a of the Respondent's Appendix. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the Cologne Local Court, pursuant to § 215 of the Konkursordnung (§ 215 of the German Bankruptcy Act).

hibit Kaussen's heirs from interfering with Dr. Goerg's administration of the estate, and fully and finally adjudicate the rights of Kaussen's heirs, all of whom are German citizens.

Evidently anticipating Ms. Skowronek's efforts to circumvent their decrees, the West German courts not only granted the administrator's bankruptcy petition over her objections, but also affirmatively imposed upon her the obligation to provide Dr. Goerg information regarding any and all property of the estate, wherever located, and ordered her to execute powers of attorney in favor of Dr. Goerg to permit him to take possession of all of Kaussen's properties in West Germany and abroad. Ms. Skowronek refused to comply with the orders of the West German courts and fled to Canada, where she apparently has taken up permanent residence.

Having lost in the West German courts, Kaussen's heirs, in contravention of those courts' decrees, nevertheless proceeded to assert their claims in the courts of other jurisdictions, including the state courts of Fulton County, Georgia and various courts in California and Canada.[3] In addition, in proceedings conducted without regard to those pending in the Federal Republic of Germany, the Georgia administrator of the Kaussen estate (Petitioner here), a former employee of Kaussen and close associate of both Kaussen and Ms. Skowronek, has independently taken possession of the property of the estate located in Georgia.

On June 13, 1986, Dr. Goerg filed a petition under 11 U.S.C. § 304 (1982) ("section 304") seeking recognition and enforcement of the West German decrees according to the well-established principles of comity embodied in

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[3] Included in the Respondent's Appendix at page 49a, is a pertinent judgment of the Court of Appeal, Province of Quebec, District of Montreal, issued on February 8, 1988.

section 304. *Reproduced at* Respondent's Appendix p. 58a. The petition calls upon the U.S. Bankruptcy Court for the Northern District of Georgia to assist in implementing the orders entered by the West German bankruptcy court and to prevent the Kaussen heirs from relitigating in the United States issues already decided against them in bankruptcy proceedings in West Germany.[4]

B. The Statute.

Congress enacted section 304 in 1978 to allow foreign representatives of foreign bankruptcy-like proceedings to enforce judgments arising out of those foreign proceedings in the United States. Under section 304, a foreign representative can institute an action ancillary to the foreign proceeding in a U.S. bankruptcy court, and is thereby relieved of bringing multiple actions in order to marshal assets found in several jurisdictions. Section 304(a), the subsection specifying eligibility requirements for ancillary assistance, states that a foreign representative in a foreign proceeding may commence a case ancillary to a foreign proceeding by filing a petition under section 304 with the bankruptcy court. Section 304 (b) specifies the relief available to foreign representatives. The factors that a bankruptcy court must consider in deciding what relief, if any, is appropriate are set forth in section 304(c). Those factors were intended to assure an economical and expeditious administration of the foreign estate consistent with just treatment of all claimants and the principles of comity.

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[4] In November, 1988, following the remand of this case by the Eleventh Circuit, Dr. Goerg filed an amended and restated petition in the Bankruptcy Court setting forth developments in the case since that court's initial opinion, including a report on the status of the various collateral actions pending in the courts of Georgia and California involving variously Dr. Goerg, the two state probate administrators, the German heirs, and certain German creditors. *See* Respondent's Appendix at p. 67a.

C. Decisions Below.

The issue facing the Bankruptcy Court in this case involved only section 304(a), the section governing Dr. Goerg's eligibility to seek ancillary relief pursuant to section 304. The Bankruptcy Court determined that it did not have jurisdiction even to consider Dr. Goerg's section 304 petition because it involved a decedent's estate, which would not qualify as a "debtor" in a full bankruptcy case under the U.S. Bankruptcy Code.

In reaching its decision, the Bankruptcy Court noted the paucity of case law available to guide its decision and gave a very narrow reading to the applicable statutory language. Section 304(a) states that a section 304 petition may be filed by a "foreign representative" in a "foreign proceeding." In defining the term "foreign proceeding," section 101(22) of the Bankruptcy Code speaks of a proceeding "in a foreign country in which the *debtor's* domicile, residence, principal place of business, or principal assets were located" at the commencement of the proceeding. 11 U.S.C. § 101(22) (Supp. IV 1986) (emphasis added) ("section 101(22)"). Because the statute employs the possessive adjective "debtor's" to modify the word "domicile," the Bankruptcy Court concluded that judisdiction under section 304 is limited to cases in which the subject of the foreign insolvency proceeding qualifies as a "debtor" under the U.S. Bankruptcy Code. *In re Goerg*, 64 B.R. 321, 324 (Bankr. N.D. Ga. 1986). The Court held that it did not have jurisdiction to consider Dr. Goerg's petition to initiate an ancillary proceeding because a decedent's estate may not be a debtor under the Bankruptcy Code. *Id.* The Bankrutcy Court, however, recognized that its decision was contrary to the procomity purpose of the statute. It wrote:

> Here we have German nationals who have lost their appeals to assert their interest in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia.

> In Georgia, they will receive what they could not from their own home courts . . . . As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur.

Id. at 325. The District Court, following similar reasoning, affirmed the decision of the Bankruptcy Court. *In re Klaus Hubert Goerg*, No. C-86-2096-A, slip op. at 4-6 (N.D. Ga. January 8, 1987).

On appeal, the Eleventh Circuit reversed and held that section 304 provides for jurisdiction over proceedings ancillary to foreign insolvency proceedings so long as the entity that is the subject of the foreign proceeding qualifies for insolvency administration under the subject foreign law. *In re Klaus Hubert Goerg*, 844 F.2d 1562, 1568 (11th Cir. 1988). In reaching its decision, the Eleventh Circuit, like the Bankruptcy Court, focused on the word "debtor" in the section 304 context. Unlike the Bankruptcy Court, however, the Eleventh Circuit found the term to be ambiguous. "Debtor" could refer to either the U.S. Bankruptcy Code's definition of debtor, or the requisite foreign law's definition of debtor. *Id.* at 1567. Because of this ambiguity, the Eleventh Circuit stated that it must choose the alternative that best advances the purpose of section 304. *Id.* at 1567.

The Eleventh Circuit then examined the purpose of section 304, and it recognized that Congress enacted the section to empower bankruptcy courts to aid foreign courts by giving effect to decisions in foreign insolvency proceedings. The section, therefore, merely provides for cases ancillary to foreign proceedings and does not re-

quire the commencement of full bankruptcy cases in which the bankruptcy courts administer assets. *Id.* at 1567. Because the focus of section 304 is to make U.S. enforcement powers available to foreign representatives, the Eleventh Circuit determined that looking to the law of the place of the foreign proceeding for the definition of "debtor" best fulfilled section 304's pro-comity goals. *Id.* at 1568. Therefore, because a decedent's estate qualifies as a debtor under German law, the Eleventh Circuit directed the Bankruptcy Court to entertain Dr. Goerg's section 304 petition. Petitioner seeks review of this decision.

D. Basis of Federal Jurisdiction.

Jurisdiction of the Eleventh Circuit is conferred by 28 U.S.C. § 1291 (1982).

Jurisdiction of the District Court is conferred by 28 U.S.C. §§ 1331 and 1334 (1982).

Jurisdiction of the Bankruptcy Court is conferred by 11 U.S.C. § 304 (1982).

REASONS FOR DENYING THE WRIT

This case presents no issues requiring Supreme Court review. The Eleventh Circuit's decision construing section 304 of the Bankruptcy Code is consistent with Congressional intent. It does not disturb the normal course of judicial administration or the allocation of jurisdiction between the federal and state courts. Moreover, because no other United States Court of Appeals has yet addressed the same issue, the Eleventh Circuit's decision creates no conflict among the circuits. Finally, the opinion concerns a point of statutory construction that is likely to have an extremely limited impact because it will affect very few potential litigants. Supreme Court review of this matter is, therefore, not necessary, and certiorari should be denied.

I. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH CONGRESSIONAL INTENT THAT SECTION 304 ESTABLISH A PROCEDURE TO EXTEND COMITY TO FOREIGN INSOLVENCY PROCEEDINGS.

A. Congress Intended Section 304 as a Recognition and Enforcement Proceeding to Prevent Problems of Relitigation, Inconsistent Judgments, and Inequitable Treatment of Claimants That Previously Plagued Insolvency Proceedings Involving Multinational Estates.

Before 1978, no federal forum was available to foreign bankruptcy trustees seeking recognition of judgments rendered in foreign insolvency proceedings involving multi-national estates. Foreign representatives, therefore, were often forced to bring multiple proceedings under the laws of various states and nations to marshal the assets of such estates. Such multiple proceedings often resulted in a host of inefficiencies, inequities and inconsistent results—the dismemberment of international estates through the application of diverse local laws not designed to respond to the equities presented by complex international bankruptcy cases; relitigation of issues by disappointed claimants attempting to circumvent the judgments of the courts of other nations; redundant administrative costs to already insolvent estates; and inequitable distributions of assets among creditors and other claimants depending upon the jurisdiction or jurisdictions in which claims were filed. *See Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452 (2d Cir. 1985); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982); H.R. Rep. No. 595, 95th Cong., 1st Sess. 324-325 (1977) ("House Report"); S. Rep. No. 989, 95th Cong., 2d Sess. 35 (1978) ("Senate Report"); Gallagher & Hartje, *The Effectiveness of Section 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 Ann. Surv. Bankr. L. 1 (1983) ("Gallagher & Hartje"); Un-

ger, *United States Recognition of Foreign Bankruptcies*, 19 Int'l. Law. 1153 (1985).

In 1978, to combat this problem, Congress enacted section 304. The section authorizes bankruptcy courts, in cases ancillary to foreign proceedings, to recognize the judgments of, and to assist, foreign courts that have jurisdiction to administer foreign estates owning property in the United States but that lack the power to enforce those judgments in this country. In such ancillary proceedings, U.S. bankruptcy courts can enforce judgments entered in foreign insolvency proceedings by enjoining actions against property of the foreign debtor, enjoining enforcement of judgments against such property, ordering turnover of such property to foreign representatives, and ordering other relief. 11 U.S.C. § 304(b). It thereby allows U.S. bankruptcy courts to fashion relief that promotes "economical and expeditious administration" of foreign estates owning U.S. property, consistent with "[p]rinciples of international comity and respect for the judgments and laws of other nations . . . ." House Report, 324-325; Senate Report, 35.

Ancillary proceedings under section 304 do not require bankruptcy courts to conduct full bankruptcy administrations pursuant to U.S. bankruptcy law. Instead, U.S. bankruptcy courts, in effect, lend their equitable powers over the local *res* to the foreign court. As two commentators have noted:

> Section 304 is a creature very different from any of the other approaches to American bankruptcy cases under the Code. Under Section 304, a qualifying foreign representative is able to bypass the usual administrative requirements of a full-blown bankruptcy case. There is no "debtor." No administration is required, or appropriate. The proceeding is purely in rem. The proper role of a Section 304 case is the extension of American equitable power to a

> . . foreign court in order to preserve the principle of equality economically achieved.

Gallagher & Hartje at 19.

Cunard Steamship Co. v. Salen Reefer Services, A.B., 773 F.2d 452 (2d Cir. 1985), the only other circuit court decision discussing section 304, is consistent with this view of the statute. In that case, the district court had vacated a domestic attachment and enforced a stay issued in a Swedish bankruptcy proceeding. *Id.* at 454. The Second Circuit upheld the decision, noting that, although the district court did not err in enforcing the Swedish stay on grounds of comity alone, it should have referred the case to its bankruptcy unit for section 304 proceedings because such proceedings would have been more appropriate. *Id.* at 455. In a detailed analysis of the nature of section 304, the Second Circuit emphasized that "[t]he ancillary proceeding was conceived as a more efficient and less costly alternative to commencing a plenary proceeding which would be duplicative of a foreign proceeding." *Id.* at 456. The Second Circuit, like the Eleventh Circuit in this case, also recognized the importance of comity to the ancillary scheme and the abuses possible if there were no mechanism to facilitate the extension of comity:

> The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property . . . enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.

Id. at 457-58.

B. The Eleventh Circuit Decision That the Word "Debtor" in the Section 304 Context Refers to the Foreign Debtor as Defined by the Law of the Foreign Proceeding Is Consistent With Congressional Intent.

In this case, the Eleventh Circuit construed section 304 to give effect to its pro-comity purpose. In analyzing the section, that court determined that the word "debtor's" in the Bankruptcy Code definition of "foreign proceeding" was susceptible to more than one interpretation. *In re Goerg*, 844 F.2d at 1567. It therefore turned to the purpose of the statute to construe it, and found:

> Because the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law. *See* Boshkoff, *United States Judicial Assistance and Cross-Border Insolvencies*, 36 Int'l & Comp. L.Q. 729, 740-41 (1987); Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 (1985). Indeed, in light of the comity concerns that induced Congress to enact section 304, it would make eminent sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available.

Id. at 1568. Thus, the Eleventh Circuit held that an entity that is properly subject, under applicable foreign law, to a "foreign proceeding" may seek ancillary assistance under section 304 whether or not it qualifies as a debtor under U.S. law.

The Eleventh Circuit's construction of the statute is correct. Subparagraph (a), the portion of section 304 dealing with eligibility to file a petition, provides that a "foreign representative" in a "foreign proceeding" may

commence a section 304 action. Section 101(22) defines a "foreign proceeding" as a

> proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge or effecting a reorganization.

This definition is broad and includes all foreign proceedings having a bankruptcy-like purpose. The definition identifies a class of foreign proceedings based on their purpose and does not suggest that any law other than the law of the foreign forum should govern eligibility for the foreign proceeding or for section 304 relief. *Id.*

The Petitioner's argument that the word "debtor's" in the definition of foreign proceeding "straightforwardly" imposes an additional eligibility requirement simply ignores the context in which the word appears. If Congress had intended to require entities to qualify as debtors under the U.S. Bankruptcy Code before being eligible for ancillary relief, it easily could have done so in section 304(a), the eligibility provision of section 304, rather than inserting this additional substantive requirement in a definitional section.

The Petitioner also argues that, because the Uniform Probate Code provided "procedures for the ancillary administration of foreign decedents' estates" at the time section 304 was enacted, Congress intended to exclude foreign decedents' estates, which do not qualify as debtors under U.S. bankruptcy law, from eligibility for ancillary proceedings. The Petitioner's argument, however, ignores that Congress's express concern in enacting section 304 was to provide an efficient means of evaluating, recognizing, and enforcing the decrees of foreign courts rendered in bankruptcy-like proceedings. The presence in

section 304(c) of standards for evaluating foreign laws evidences Congress's intent that the section be applied notwithstanding differences between U.S. law and the law of the foreign proceeding. Given that Congress realized that there would be differences between U.S. and foreign law and made provisions for dealing with those differences, the mere fact that the Uniform Probate Code (which even now has been adopted by only fifteen states [5]) arguably overlaps with section 304 is no reason to infer that Congress intended to exclude from section 304 relief all bankruptcy proceedings involving insolvent foreign decedents' estates.

Finally, the Petitioner argues that the abstention provision of section 1334(c)(2) of Title 28 of the U.S. Code indicates that the Eleventh Circuit's decision is inconsistent with Congressional intent. The abstention provision cited by the Petitioner, however, applies to actions that can be timely adjudicated in a state forum.[6] Section 304 is predicated on the idea that multiple uncoordinated proceedings cannot efficiently administer a multi-jurisdic-

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[5] Uniform Probate Code (U.L.A.), Table of Jurisdictions Wherein Code Has Been Adopted (Supp. 1988).

[6] 28 U.S.C. § 1334(c)(2) provides that:

> Upon timely motion of a party in a proceeding based upon State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

28 U.S.C. § 1334(c)(2) (Supp. IV 1986).

tional estate. Congress intended section 304 to replace the patchwork of American choice-of-law rules with a single recognition and enforcement standard to which a representative of a foreign decedent's estate can look. In addition, the special abstention provision of section 305 (a)(2) of the Bankruptcy Code, providing that bankruptcy courts may dismiss or suspend proceedings when there is pending a foreign proceeding, suggests that Congress intended that deference be given to foreign proceedings.[7]

The Eleventh Circuit's construction of section 304 is consistent with the purpose of the statute. It makes it possible for the bankruptcy court to thwart the attempts of German litigants to relitigate claims that they fully litigated and lost in the court of last resort in their home country. Such an attempt by one claimant to grab a disproportionate amount of an insolvent estate's assets, in direct contravention of orders to which it was subject and to the detriment of other claimants, is a paradigm example of the behavior section 304 was designed to prevent.

Thus, the Eleventh Circuit's decision promotes Congress's intent to eliminate the problems of relitigation, forum shopping, and inconsistent treatment of claimants that were prevalent before section 304's enactment. It will permit U.S. bankruptcy courts to recognize and enforce the judgments of courts in which foreign proceedings are pending, thereby allowing for administration un-

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[7] Section 305(a)(2) provides as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> . . .
>
> (2)(A) there is pending a foreign proceeding; and
>
> (B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

11 U.S.C. § 305 (1982).

der the law of a single forum notwithstanding minor differences between the law of that forum and U.S. law.

II. THE ELEVENTH CIRCUIT'S OPINION DOES NOT DEPART FROM THE USUAL COURSE OF JUDICIAL ADMINISTRATION AND THEREFORE DOES NOT CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Petitioner has argued that the Eleventh Circuit's decision departs from the usual course of judicial proceedings because the decision will result in federal probate administration and will cause the bankruptcy courts to be inundated with requests to conduct probate administrations of solvent foreign decedents' estates owning property in the United States. Thus, the Petitioner asserts that review by this Court is required. However, as more fully argued below, the Eleventh Circuit's decision will not affect judicial administration in the manner suggested by the Petitioner. The Eleventh Circuit specifically determined that section 304 does *not* involve federal probate administration. Further, bankruptcy courts will not be flooded with requests to administer solvent foreign decedents' estates because the Eleventh Circuit's decision did not create an entitlement to relief under section 304 for solvent foreign decedents' estates.

A. Because the Eleventh Circuit Concluded That Ancillary Proceedings Do Not Involve Federal Administration of Probate Estates, the Petitioner's Concern About Standardless Federal Probate Administration Is Misplaced.

The Petitioner urges this Court to review the decision below because "the Eleventh Circuit's conclusion that bankruptcy jurisdiction extends to the administration of a foreign decedent's estate 'has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.'" Petition at 14. The Petitioner argues that bank-

ruptcy courts, unlike state courts, lack the statutory authority and specific statutory guidelines necessary to administer a probate estate effectively. Petition at 14. The Petitioner goes on to detail the horrors and uncertainties that he imagines would result from such an administration. Petition at 14-16.

The Petitioner's argument fails because the Eleventh Circuit expressly determined that section 304 does *not* provide for bankruptcy administration of the foreign estate. *See In re Goerg*, 844 F.2d at 1568. The statute merely provides a standard and mechanism for the recognition of judgments and orders arising out of foreign proceedings. The Eleventh Circuit wrote:

> The filing of a Section 304 petition does not commence a full bankruptcy case; a Section 304 case is an ancillary case in which a United States bankruptcy court is authorized to apply its processes to give effect to orders entered in a foreign insolvency proceeding. . . . Because the focus is on making United States processes available in aid of foreign proceedings, *not actual bankruptcy administration*, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law.

Id. at 1567-1568 (emphasis added).

It would be nonsensical for this Court to review the Eleventh Circuit's decision because the Petitioner disagrees with something the Eleventh Circuit did not hold. Contrary to the Petitioner's suggestion, neither the Eleventh Circuit nor the Respondent has ever suggested that the bankruptcy court should conduct a federal common-law probate administration. A bankruptcy court, in extending section 304 jurisdiction to a foreign decedent's estate, *will not be required* to adjudicate "issues of year's support, lien priorities, administrator's expenses, etc." (Petition at 16), under bankruptcy law. The bankruptcy court's limited role in ancillary proceedings—assisting

the foreign administration—is to apply the section 304 (c) standards, to enforce foreign orders that the issuing court could not enforce, to enjoin concurrent domestic actions, and, in the appropriate case, to impose additional requirements on the foreign proceeding to protect domestic claimants. *See* 11 U.S.C. § 304(b).

The Petitioner's suggestion that the Eleventh Circuit decision is contrary to the directions of this Court that "federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by statute" (Petition at 16) is puzzling in light of the limited nature of ancillary proceedings and the existence of an express statute. In section 304 Congress expressly empowered bankruptcy courts to decide whether to recognize foreign proceedings in the face of concurrent state proceedings and, in section 304(c), provided them with standards to do so. To argue, as the Petitioner appears to, that the implementation of a uniform federal comity standard spelled out by Congress amounts to total usurpation of state court jurisdiction and so radically departs from recognized judicial practice as to warrant an exercise of this Court's supervisory power requires a gross distortion of the Eleventh Circuit's opinion and reflects a gross misunderstanding of the nature of section 304 proceedings.

The Petitioner's repetition of the district court's assertion that "[i]t seems unlikely that Congress would exclude American decedents' estates from the Bankruptcy Code but allow foreign decedents' estates to be protected" (Petition at 13) also reflects a misunderstanding of section 304 and of the Eleventh Circuit decision. In support of its decision below, the Eleventh Circuit wrote, "it bears emphasizing that a section 304 debtor does not receive the benefits of full bankruptcy administration under United States law." *In re Goerg*, 844 F.2d at 1568. The application of section 304 in this case will not give a foreign debtor a bankruptcy advantage over U.S. citi-

zens; indeed, failure to apply section 304 would waste judicial resources and give unfair advantage to certain foreign claimants by allowing those claimants to forum shop and to relitigate claims. Rather than giving foreign debtors a benefit denied U.S. citizens, section 304 merely provides a mechanism by which the benefits and burdens of the foreign debtor's own law may be enforced. It does not allow foreign debtors who would be ineligible for bankruptcy administration under U.S. law to somehow evade the burdens of U.S. law while obtaining the benefits.

B. The Eleventh Circuit's Decision Will Not Flood the Bankruptcy Courts with International Probate Matters Because It Does Not Hold that Every Foreign Decedent's Estate Is *Entitled* to Ancillary Assistance, But Merely that the Representative of a German Bankruptcy Estate Involving an Insolvent German Decedent's Estate Eligible for Bankruptcy Under German Law Meets the *Threshold Requirements for Requesting* Ancillary Assistance Under Section 304.

The Petitioner's final argument that the decision of the Eleventh Circuit opens the federal bankruptcy courts to all foreign decedents' estates regardless of whether they are insolvent again evidences his propensity for arguing that "the sky is falling." The Petitioner expresses concern that, after the decision of the Eleventh Circuit, the federal bankruptcy courts will be inundated with requests from representatives of foreign decedents' estates for administration of those estates. However, the Eleventh Circuit did not hold that section 304 relief is available to all foreign decedents' estates, and, as stated by the Petitioner himself, that court "presumed that section 304 was intended to apply only to foreign insolvency proceedings . . . ." Petition at 18. Like the Petitioner's other arguments, this argument addresses an issue that was not raised by the holding below, that is unlikely to arise, and that properly can be addressed by the

lower courts when and if it does arise. Accordingly, the concerns raised by the Petitioner simply do not merit action by this Court.

In the case that is before the Court, the Eleventh Circuit held merely that a German bankruptcy trustee for a German debtor eligible for bankruptcy administration in Germany but not in the United States passes the threshold eligibility requirement to request ancillary assistance. That Court did not reach the issue of whether a German probate administrator outside of German bankruptcy proceedings would pass those requirements. Neither did it address the scope of the ancillary assistance the foreign representative in this case might be entitled to receive. Section 304(c) specifies the factors that bankruptcy courts must consider in determining whether relief is appropriate, among them an examination of the law of the jurisdiction of the foreign proceeding, including issues such as who may be a debtor in that country and whether the proceeding is of the sort to which Congress intended to extend comity. The Eleventh Circuit construed only the portions of section 304 that set out eligibility requirements for filing a section 304 petition and expressly left open and remanded the issue of what relief is appropriate.

The Petitioner's argument that the bankruptcy courts will be inundated with probate matters depends upon a set of facts not before the Court and raises concerns about a highly speculative harm. It is unlikely that a representative of a solvent foreign decedent's estate that is not the subject of a foreign insolvency proceeding would request ancillary assistance from a U.S. bankruptcy court, and it is even more unlikely that a bankruptcy court would grant ancillary relief if such a case were presented. Further, it is still more unlikely that bankruptcy courts would establish a pattern of extending discretionary relief in such cases. Moreover, if the bankruptcy courts were to establish such a pattern, the district and

circuit courts would be the appropriate forums for initial review. Because the threat to judicial administration of the United States presented by the Petitioner is so speculative, further review of the Eleventh Circuit's decision is not called for.

III. BECAUSE THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THE UNIFORMITY OF THE FEDERAL LAW IS NOT THREATENED, THIS COURT SHOULD NOT GRANT CERTIORARI.

An important function of the Supreme Court is to maintain uniformity in federal law by resolving conflicts among decisions of the federal appellate courts. The U.S. Courts of Appeals are courts of last resort in the absence of Supreme Court review. Without Supreme Court action to resolve conflicts among the circuit courts, federal uniformity could be lost. This Court, therefore, often grants certiorari to resolve conflicts among the federal courts of appeals. *See, e.g., Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967) (widespread conflict among the circuits existed); *Goldlawr, Inc. v. Herman*, 369 U.S. 463 (1962) (conflict between the Second Circuit and the D.C. Circuit).

In this case, however, no conflict threatens the uniformity of federal law, and there is no need for certiorari. No other courts of appeals have addressed the question whether a bankruptcy court has jurisdiction to entertain a section 304 proceeding involving an entity that does not qualify as a debtor under the U.S. Bankruptcy Code. Thus, the Eleventh Circuit's decision does not create a conflict among the circuits. Further, the Eleventh Circuit's opinion is consistent with the decisions of lower courts that have addressed issues similar to the issue raised in this case. These lower courts, in reasoned decisions, have similarly declined to impose

domestic eligibility requirements on foreign proceedings that were otherwise eligible for ancillary assistance. *See, e.g., In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). There ancillary assistance was granted in foreign insurance company and bank liquidation proceedings although section 109(b)(3) of the Bankruptcy Code provides that insurance companies and banks cannot maintain Chapter 7 liquidation proceedings. The Eleventh Circuit reached no radical conclusions; it merely took a small step in the incremental process of interpreting a new statute. In short, the uniformity of federal law is not in danger, and Supreme Court action is not required.

The mere fact that a California bankruptcy court, prior to the Eleventh Circuit's decision, declined to grant a preliminary injunction because it erroneously found no "foreign proceeding" as defined in section 101(22) does not create a conflict requiring correction by the Supreme Court. *See In re Petition of Klaus Hubert Gorg* (sic), No. 3-86-0194OJR, slip op. (Bankr. N.D. Cal. August 15, 1986). The California bankruptcy court's opinion is unlikely to have any precedential effect. Its brief order was unreported, never appealed or affirmed, and contained no reasons for the decision. It, therefore, will not spawn a great deal of contrary law. Moreover, while it is the Supreme Court's function to maintain uniformity among the appellate courts, the appellate courts are charged with maintaining uniformity within their circuits and with supervising the district courts. *See* Stern, Gressman, and Shapiro, *Supreme Court Practice* 207 (6th ed. 1986). In time, the Ninth Circuit may issue an opinion in accordance with the Eleventh Circuit opinion, thus avoiding any conflict. When a conflict may be resolved by future appellate court decisions and a consensus may evolve without Supreme Court action, this Court should reserve its judicial resources and forebear from granting certiorari. *See* Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959).

Moreover, when the issue involved in a case is new and uncharted, judicial restraint ordinarily should be exercised and certiorari declined whether or not a conflict exists. Unlike cases involving recurring problems, where the consequences of a resolution may be anticipated, the ramifications of deciding a new issue are often unforeseeable. Experience with the conflicting law over time will illuminate the issues. *McCray v. New York*, 461 U.S. 961 (1983) (this Court refused to grant certiorari to consider the novel issue of the constitutionality of peremptory jury challenges). In *McCray*, Justice Stevens, writing for the Court, stated:

> I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.
>
> * * * *
>
> In my judgment it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Id. at 962-63.

Further experience in the lower courts with section 304 will likewise illuminate the intricacies of that section. Section 304 was enacted in 1978. It had no predecessor under prior law, and as yet few cases construing the section have been decided. Although Petitioner boldly asserts that the Eleventh Circuit's opinion in this case will force bankruptcy courts into the business of administering the estates of foreign decedents (Petition at 17), that argument is only a speculative overstatement, and nothing of the sort is likely to occur. *See supra* at II.B. Before this Court devotes further attention to this issue, the bankruptcy courts, under the capable supervision of the district and circuit courts, should be allowed to serve

as laboratories for the issue. Meanwhile, no risk will be incurred as a result of this Court's denial of review.

CONCLUSION

Section 304 provides for the enforcement in the United States of orders and judgments arising out of foreign insolvency proceedings. Congress's purpose in enacting section 304 was to create a uniform standard for recognizing and enforcing the decrees of foreign courts rendered in bankruptcy-like proceedings for the purpose of promoting the economical and expeditious administration of foreign estates owning property in this country. The Eleventh Circuit, after considering the language, structure, and legislative history of section 304, held that the judgments entered in foreign insolvency proceedings concerning insolvent decedents' estates are entitled to recognition according to the same standards as the judgments entered in other types of foreign insolvency proceedings.

Contrary to the Petitioner's argument, the decision of the Eleventh Circuit will not lead to the development of a federal common law of probate administration. Neither will it flood the bankruptcy courts with foreign probate cases. Indeed, the Eleventh Circuit's decision will have no discernible impact on judicial administration in the United States. The Petitioner's argument to the contrary is based on a gross misreading of the statute and of the Eleventh Circuit's decision and does not present any reason for this Court to exercise its supervisory power.

In addition, the Eleventh Circuit's interpretation of section 304 is not in conflict with the decision of any other circuit court of appeals. No other circuit has addressed this specific issue, and the few decisions that have been rendered under section 304 are consistent with the opinion of the Eleventh Circuit. Given that there is currently no realistic threat to the uniformity of federal

law and that the understanding of issues presented by section 304 will benefit by further study and discussion in the lower courts, certiorari in this case is both unnecessary and premature.

Respectfully submitted,

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APPENDICES

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APPENDIX A

Certified German-English Translation

71 N 641/85

AMTSGERICHT KOELN
COLOGNE LOCAL COURT
FEDERAL REPUBLIC OF GERMANY
(COURT OF FIRST INSTANCE HAVING JURISDICTION)

COURT ORDER

Re the estate of the late

Heinz Guenter Kaussen, M.B.A., deceased on April 14/15, 1985, last residence: Neusser Str. 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Administrator: Hermann Haeck, CPA and Tax Consultant, M.B.A., address: Mariawaldstr. 9, 5000 Cologne 41, Federal Republic of Germany;

—Co-Administrator: Dr. Karl Heinz Maus, CPA and Tax Consultant, M.B.A., address: Bartmannstr. 32, 5020 Frechen, Federal Republic of Germany.

Upon petition of the Administrator, bankruptcy proceedings shall commence as of this date, January 24, 1986, 9 a.m. because the estate is over-indebted (Paragraph 215, Bankruptcy Act).

Dr. Klaus Hubert Goerg, Attorney at Law, Theodor-Heuss-Ring 62, 5000 Cologne 1, Federal Republic of Germany, Tel. 0221/120141, is herewith appointed as Trustee in Bankruptcy.

Claims against the decedent's bankrupt estate shall be filed with the Court by *March 5, 1986.*

A court order re: the retention of the appointed Trustee or the appointment of a new Trustee, the appointment of a committee of creditors, the sale of immovables by private sale, the deposit of money, securities and valuables and other items listed in Paragraphs 132, 134 and 137 of the Bankruptcy Law shall be passed

on *Friday, March 7, 1986, 10:30 a.m.*

The examination of the claims filed shall take place on

Wednesday, June 25, 1986, 10:00 a.m.

Place: Cologne Local Court, Reichenspergerplatz 1,
Ground Floor, Rm. 18,
Federal Republic of Germany.

Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not deliver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report the possession of any property as well as any claims, for which separate realization is sought, to the Trustee by

March 5, 1986.

The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any persons authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other persons authorized to dispose of the property shall report any and all property (things and rights) which was part of the estate on April 14/15, 1986, and any and all property subsequently added to the estate or removed from the estate to the Trustee. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall grant the Trustee all powers of attorney permitting him under the laws of the respec-

tive state of situs to take possession of the deceased's property located abroad and constituting part of the decedent's estate and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ ((Federal Supreme Court of Justice For Civil Cases, a collection of published decisions)) 68, 16, 17; 88, 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy sequestration shall also include the proceeds of property of the deceased located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been ordered in the foreign country under the laws of that respective country.

A mail, telephone and telegraph ban is herewith decreed. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The members of the preliminary committee of creditors shall be:

1. Dr. Herbert Heidland, Attorney at Law, Antwerpener Str. 2, 5000 Cologne 1, FRG

2. Wolfgang Kellert, Bank Director, Schumannstr. 9, 5090 Leverkusen, FRG

3. Bayerische Hypotheken- und Wechsel-Bank Aktiengesellschaft, represented by Board members Dr. Hans

Fey and Dr. Klaus Geiger, Theatinerstr. 11, 8000 Munich 2, FRG.

Cologne, FRG, January 24, 1986

Local Court, Dept. 71
Dr. Uhlenbruck
Judge, Local Court
Executed by:
(Signed)
Court Clerk (Court Seal)

APPENDIX

The Hague Convention dated October 5, 1961

1. Country: Federal Republic of Germany

   This official document

2. is signed by
   Ms. Iske

3. in her capacity as
   Court Clerk.

4. It bears the stamp of the Cologne Local Court No. 638
   Certified

5. in Cologne, FRG,

6. on January 31, 1986

7. by the Vice President of the Landgericht (Regional Court)

8. No. 910 E-249.

9. (Seal)

10. Signature (Signed) Schmitz

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
Accredited by U.S. Dept. of State
733 Courtenay Dr. NE
Atlanta, GA 30306

APPENDIX B

Certified German-English Translation

19 T 58/86

COLOGNE REGIONAL COURT
(LANDGERICHT KOELN)

FEDERAL REPUBLIC OF GERMANY

DECREE

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: 5000 Cologne 1, Neusser Strasse 30-32, FRG,

Trustee in Bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne,

to which Mrs. Ingeborg Skowronek, 5000 Cologne 1, Neusser Strasse 30-32, FRG, is a party, as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, 4300 Essen 1, Zeunerstrasse 32, and Koch II and Partners, Cologne, FRG,

on February 17, 1986, the 19th Division for Civil Matters of the Cologne Regional Court held and ruled as follows on the special appeal (filed within a certain time limit) by the heiress filed on February 5 and 7, 1986, respectively, of the decree of the Cologne Local Court dated 1-24-86, file #71 N 641/85, served upon the heiress on January 28, 1986:

1. The appeal is dismissed at the cost of the heiress.

2. Due to obvious incompleteness, the decree of the Division dated January 9, 1986, file # 19 T 8/86, shall be corrected to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86.

Grounds for the Decision:

The special appeal which was filed in due form and time had to be dismissed, with cost consequences in accordance with § 97, German Code of Civil Procedure (ZPO). It is not justified by the facts. The Bankruptcy Court rightly commenced bankruptcy proceedings of the decedent's estate under § 215 and following of the Bankruptcy Act (KO). The fact of the matter is, documented by the appraisals submitted, that the estate is over-indebted.

The appeal of the decree to commence bankruptcy proceedings is dismissed.

The administrator had filed a petition in accordance with the provisions of § 1980 and 1985, German Civil Code (BGB). Administrator Haeck filed this petition with the Court Clerk's office on 11-13-85.

Co-administrator Dr. Maus' participation in filing a petition in bankruptcy was not required for it to be effective. The position of a co-administrator is purposely not mentioned in the provisions of § 1960 and following of the German Civil Code (BGB). Occasionally, in cases involving large or complex estates, a co-administrator is appointed much like a controlling guardian under § 1799 and following, German Civil Code, as a type of controlling body having enumerative functions of approval (compare § 1809-1816, 1818-1824, German Civil Code). The above-mentioned cases of approval in the law concerning wards cannot be applied to estates ipso iure. As in the estate law one or several such provisions are lacking, the duties of the co-administrator can be understood only in such a way that he has certain controlling and cooperative functions, without having authority to make independent decisions. Naturally he can, if he disapproves of the management of the administrator, turn to the Probate Court in order to have orders issued to the administrator.

Due to the consequences as to liability and criminal law of an omission of filing, he is unable to keep the administrator from filing when an act of bankruptcy exists. The legal position could be evaluated differently only if several administrators had been appointed as equal administrators (also see Jaeger/Weber § 217-220, Bankruptcy Act, marginal note 10).

In essence, however, the issue of whether a joint filing is necessary is irrelevant, because co-administrator Dr. Maus and Mr. Haeck, C.P.A., appeared before the Court Clerk of the Local Court and declared that bankruptcy proceedings had to be commenced. The fact that the petition in bankruptcy was not recorded by Dr. Maus, is irrelevant under the law, because Dr. Maus expressly agreed with the petition, not only the same day, but also at later dates.

As the negative function of the controlling guardian is limited to denying approval of legal transactions of the guardian requiring approval, nothing more can be required from the co-administrator. However, as Dr. Maus has granted his approval of the petition for bankruptcy of the administrator, the effectiveness of this petition is unchallenged.

The notification of a defect by the heiress, i.e., that she had not been granted sufficient right to be heard, lacks any factual basis.

The Division concurs with the Bankruptcy Court that due process of law must be granted in bankruptcy proceedings as well (see H.J. Maintzer, "Granting of Due Process in Bankruptcy Proceedings," KTS 1985, 617 and following). According to the general opinion reflected in the literature and consistent court rulings, bankruptcy commencement proceedings are summary (expedited) proceedings which do not tolerate suspension or deferment (exception: § 46, Composition Rules (Vg10)). The debtor or any other third party is not entitled to receive due process of law

prior to every decision concluding the proceedings (also see Maintzer, KTS 1985, p 623).

The urgency of any bankruptcy proceedings has the necessary consequence that any involved party, after having been notified of the petition for bankruptcy, must, at any subsequent point in time, practically count on the commencement of the bankruptcy proceedings or the rejection of commencement due to a lack of bankrupt's assets (Maintzer, as cited).

A further consideration is that the acts by judges performed in the course of the bankruptcy commencement proceedings only serve the purpose of securing the potential bankrupt estate and determining its value as the basis for decision under the bankruptcy law. For those parties to the petition proceedings involved even in the remotest sense have no further control over its continuation—at least not in the sense, as is the case in a standard law suit, that they could influence the proceedings in a formative, expediting and delaying manner. Thus, their claim to be granted due process of law is reduced, which is to be subordinated to the specific requirements of these global and expedited enforcement proceedings.

This issue, however, need not be dealt with in further detail at this point:

In the case at hand, the heiress was granted ample opportunity to comment on the sequestration report. The opportunity for comment already existed on the basis of an appraisal (expert opinion) prepared by co-administrator Dr. Maus on October 1, 1985. In this appraisal, which constitutes part of the estate files, Dr. Maus arrived at an over-debtedness in the amount of DM 19,962,090.00. Dr. Maus used the same basis of valuation in this appraisal as the sequestrator at a later date. The consequences of such appraisal, including those with respect to the duties with respect to the petition for bankruptcy proceedings, had to be known to the heiress

and her counsel. There would have been ample opportunity to comment on the findings arrived at by Dr. Maus prior to the petition for bankruptcy filed by Mr. Haeck, CPA. It is thus determined that on the basis of Dr. Maus' appraisal, the parties involved in the proceedings were aware of the fact of the alleged over-indebtedness since October, 1985.

Even immediately prior to the issue of the appealed decree, the heiress was not entitled to be heard further. The contents of the files and the numerous and detailed briefs of the heiress contained therein demonstrate very clearly that the heiress was granted the right to be heard and was, in fact, granted it quite generously. Upon her request the heiress was informed that in order to check the basis for valuation used in the appraisals solicited to date, a further appraiser had been appointed by the Bankruptcy Court ex officio in order to make absolutely sure that no mistake was contained in the appraisals prepared up to that date by experts Dr. Goerg and Dr. Maus, and if so, to define it. Therefore the heiress was indeed sufficiently informed. Due to the urgency of the decree which had to be issued by the Bankruptcy Court, she should have and must have expected the decision following the receipt of the Weyers appraisal. What is more, the bankruptcy judge expressly pointed this very consequence out to one of the heiress' counsel in a meeting on 1-15-86, as is reflected in a memo dated 1-24-86. One can hardly imagine that the Appellant could have been granted more due process of law than was granted in this specific case.

Finally, a further delay of the decision on the commencement of bankruptcy proceedings by having granted further rights to be heard was not justified because of the inevitable decline in value of the estate which was addressed in the Weyers appraisal.

One of the reasons why this is justified is the fact that the heiress is not entitled to the right to petition for

bankruptcy, her being only an indirect party to the commencement of bankruptcy proceedings. The issue of whether the heirs were entitled at all to be heard in the course of the commencement of bankruptcy proceedings on the estate upon petition of the administrator or curator was rightfully left open. In any case, the due process granted thus far appears sufficient to adequately safeguard the interests of the sole heiress with respect to the assets in the FRG and abroad. Her claim to be heard can definitely not justify the commencement of the proceedings, which is economically imperative, being delayed even further, e.g., because of a splitting up of the estate into domestic and foreign property. The appraisal submitted by Prof. Sandrock shows that under international private law the heiress can freely dispose of foreign assets to a large degree. It is in the urgent interest of the creditors in implementing liability to terminate the splitting of the estate created by the international private law and to achieve uniform coverage of the bankrupt's estate because of the existing over-indebtedness. This interest takes absolute priority over the personal interest of the heiress in being able to dispose of the foreign assets. The law has provided the administrator with sole authority and responsibility with respect to his duty to petition bankruptcy proceedings. The administrator is not obligated either to grant due process to the heirs prior to his petition for bankruptcy proceedings. If the heir or heirs received more than adequate due process, thus having the opportunity to prevent the decision on a petition for bankruptcy proceedings duly issued by the administrator and co-administrator by means of constant appeals, the duty of the administrator to file such petition as an independent legal duty would in effect be totally invalidated. The heiress had the opportunity at all times to appeal the petition for bankruptcy proceedings by Mr. Haeck, CPA, by filing for his termination with the Probate Court, for example. If the petition for bank-

ruptcy proceedings was filed despite a lack of cause for opening bankruptcy proceedings, for which Administrator Haeck was responsible, this is solely an issue of the administrator's liability. In terms of the commencement of bankruptcy proceedings, it is not the heiress who is a party, but the administrator. It was he who claimed the existence of over-indebtedness of the estate when submitting his petition and proved this upon the court's request by corresponding documentation. Its accuracy, in turn, has been confirmed by the appraisals of the experts.

While the heiress in her notice of appeal makes reference—very carefully at this time—to the non-existence of estate over-indebtedness, which is required for commencement of bankruptcy proceedings under the law, this is not applicable according to the appraisals of Dr. Goerg, Dr. Maus, and Weyers. We refer to these appraisals. They are known to the heiress. Certain valuation criteria used by the appraisers can, in fact, be seen more critical. However, this does not change the fact which exists beyond any doubt on the basis of the three appraisals and to the satisfaction of this court that the estate is over-indebted. This Division of the Court, in fact, harbors the general fear—beyond the valuation used by the appraisers—that the appraisers used valuation standards based on the assumption of normal economic conditions on the real estate market. If, however, this real property must be utilized in order to realize the value it represents in order to cover the debts, this will mean a flood of additional real property on a market that has already been over-saturated in recent years, which, in turn, is bound to result in drastic price reductions specifically of the type of real property that represents the major value of the estate. This expectation is by no means utopic. Even at this time, numerous letters of interested parties which are contained in the files demonstrate that real estate brokers, purchasers and speculators count on acquiring real property at low prices in connection with the rumors

of estate bankruptcy proceedings or knowing that such proceedings have been commenced.

Furthermore, the considerations of the heiress with respect to the value and non-overindebtedness of the estate have partially lost their basis because of the Weyers appraisal. As mentioned above, the appraisal was solicited in order to enable the bankruptcy court to satisfy itself that the valuation basis submitted by Dr. Maus and Dr. Goerg contained no errors or was at least justifiable. On the basis of the convincing Weyers appraisal, the bankruptcy court determined that any valuation basis applied by the parties in these proceedings in evaluating the domestic real property was bound to result in overindebtedness. Furthermore, the amount of the debts of the estate will increase by at least another DM 25 million because of the probable commencement of bankruptcy proceedings with respect to the Westaufbau assets. Due to the delay in the commencement of bankruptcy proceedings, further losses have been incurred by the estate in the meantime, particularly in view of the constant increase in liabilities. The creditors of the estate are entitled to the bankruptcy court's ensuring that a further decline in value of the available assets is avoided by taking suitable measures and dealing with the proceedings expeditiously.

The problem of which items of the estate are part of the bankrupt estate and which are not, is entirely irrelevant with respect to the commencement of bankruptcy proceedings, i.e., whether, in the opinion of the heiress, this issue is based on the principle of territoriality, or on the principle of universality.

On page 5 of her appeal, the heiress raises the question whether the bankruptcy judge had ". . . jurisdiction at all, and if so, to what extent, to rule as reflected in the decree of 1-24-86." This question has been duly and clearly answered above: The estate is in fact over-

indebted; the administrator in fact filed a petition for bankruptcy; therefore, the bankruptcy court had to commence bankruptcy proceedings, independent of any further considerations by the heiress.

The further questions as to what authority the trustee in bankruptcy and what duties the heiress have with respect to the foreign assets, refer—if at all—to the implementation of the estate bankruptcy proceedings, the opportunities of incorporating further items of the estate in the bankrupt estate, and to the duties of cooperation of the heiress in this effort. They do not relate, however, to the preceding act of commencement of bankruptcy proceedings. As a result, they are of no significance to the decision of this issue.

As the decision of the Division of the Court dated 1-9-86, file # 19 T 8/86 does not contain a decision as to costs, in deviation from the reasons given therefor, it had to be corrected officially by corresponding application of § 319, German Code of Civil Procedure (ZPO).

In accordance with the statements made in the decision dated 1-9-86, no amount in controversy can be determined for the appeal at this time.

Neumann Boenicke-Dierdorf Mueller

Executed: (Signed) Court Clerk (Seal of the Cologne Regional Court)

* * * *

Certified to be a faithful and complete translation of the German text.

6-15-86

/s/ Anne E. Harland
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Translator/Interpreter
Accredited by U.S. Dept. of State
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APPENDIX C

Certified German-English Translation

COLOGNE HIGHER REGIONAL COURT
((OBERLANDESGERICHT KOELN))

Federal Republic of Germany

DECREE

2 W 34/86
19 T 58/86 Cologne Regional Court
71 N 641/85 Cologne Local Court

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

Trustee in Bankruptcy: Dr. K.H. Goreg, Cologne,

party to the proceedings:

Mrs. Ingeborg Skowronek, Neusser Strauss 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Judges Dr. Schmitz, Dr. Schneider and Dr. Pretzell, upon the special further appeal (subject to a time limit) by the Appellant of February 20, 1986, from the decree issued by the 19th Division for Civil Matters of the Cologne Regional Court dated February 17, 1986, which appeal was filed with this Court on February 21, 1986, has on March 3, 1986, decreed and held as follows:

I. The special further appeal shall be dismissed as inadmissible to the extent that it is directed against the following:

1. the decision by the Cologne Local Court re the commencement of the bankruptcy proceedings on the estate;

2. the court orders of the Local Court;

   a. with respect to the Appellant's duty to provide information;

   b. with respect to the reference by the Local Court to the legal consequences of commencement of the bankruptcy proceedings;

   c. with respect to the reference by the Local Court to the legal consequences of bankruptcy sequestration for the use of foreign assets which are part of the bankrupt estate.

II. Re the special further appeal from the following court orders:

1. the Appellant's obligation to grant power-of-attorney;

2. the expiration of existing powers of attorney;

3. the postal, telephone and telegraph ban, a decision will be issued by the 2nd Division for Civil Matters in its final decision.

Grounds:

I.

By decree of January 24, 1986, the Cologne Local Court commenced bankruptcy proceedings on the estate of Heinz Guenter Kaussen, deceased in April of 1985, and appointed Dr. Goerg, Attorney at Law, Cologne, as the Trustee in Bankruptcy. The decree contains court orders as follows:

1. Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not de-

liver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report to the Trustee in Bankruptcy the possession of any property as well as any claims, for which separate realization is sought by secured creditors, by March 5, 1986.

2. The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any person authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other person authorized to dispose of the property shall report any property (things and rights) which was part of the estate on April 14/15, 1985, and any property subsequently added to the estate or removed from the estate, to the Trustee in Bankruptcy.

3. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall specifically grant the Trustee in Bankruptcy all powers of attorney permitting him to take possession of the deceased's property located abroad, constituting part of the decedent's estate under the laws of the respective state of situs and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

4. Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ (Federal Supreme Court of Justice for Civil Cases, a collection of published decisions) 68, 16, 17, 88; 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy se-

questration shall also include the use and the proceeds derived from the decedent's property located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been decreed in the foreign country under the laws of that respective country.

5. A mail, telephone and telegraph ban is ordered. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The heiress of the decedent, represented by Attorney-at-Law Koch, Cologne, filed a special appeal from this decree on February 5, 1986, on the grounds that proof for the over-indebtedness of the estate had not been furnished.

Represented by Dr. Hartstang and Dr. Grote, Essen-Bredeney, Attorneys at Law, the Appellant filed a second special appeal, which was received on February 5, 1986, petitioning that:

"the decree appealed be amended and reversed, or that alternatively, the decree be partially amended and reversed in accordance with the law."

The Appellant cited the following grounds for this second appeal:

That the decree of the Cologne Local Court is based on a violation of the right to be heard because the Appellant had not been informed of a comment made by the present Trustee.

That she had further been denied an opportunity to have the appraisal by Mr. Weyers, Department Chief, dated January 24, 1986 explained verbally. In view of the contents of the appraisal, the Appellant claims, this was imperative.

The court orders issued by the Local Court, she further claims, are not confirmed by law nor by any supreme

court precedents and contains errors of law. An appeal, the Appellant claims, must clarify specifically:

1. what authority the Trustee has with respect to the foreign assets;

2. what duties the Appellant has with respect to the foreign assets; and

3. whether the bankruptcy judge had jurisdiction at all and if so, to what extent?

For the legal claims made by the Appellant, we refer to the grounds stated in the brief dated 2-3-86, pages 5 to 21, sheet 853 through 869 of the files.

By decree of February 17, 1986, the Cologne Regional Court dismissed the special appeal and decreed under subpara. 2 of the operative provisions:

"The appeal is dismissed, with the heiress bearing the costs therefor. The decree of the Division dated 1-9-86, file # 19 T 8/86, is corrected due to obvious incompleteness to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86."

The Regional Court stated as follows:

"As, deviating from the grounds stated, the decree issued by the Division dated 1-9-86, file # 19 T 8/86, does not contain a decision as to costs, it had to be corrected officially based upon an analogous application of § 319, German Code of Civil Procedure (ZPO).

On the merits, the Division addressed in detail the appeal from the commencement of the estate bankruptcy proceedings and the violation of the right to be heard under "Grounds for the Decision." Re appeal of the court orders (concerning the commencement of the bankruptcy proceedings), the Regional Court held as follows:

"The further issues as to the authority of the Trustee and the duties of the heiress with respect to the foreign

assets refer to, if applicable at all, the implementation of the estate bankruptcy, the opportunity to include further estate items into the bankrupt estate and the cooperative duties of the heiress in this effort. However, they do not refer to the act of commencement of bankruptcy proceedings which was precedent in time. As a result, they are not relevant for the decision of this issue."

The Appellant appealed the decree issued by the Regional Court by means of a special further appeal and filed a petition to the effect that:

the decree appealed be dismissed and amended and at the same time the decree of the Cologne Local Court dated 1-24-86 (71 N 641/85) be dismissed and amended;

alternatively, the above-referenced decrees be dismissed partially and amended in accordance with the law.

The admissibility of the special further appeal was addressed by the Appellant who stated that the appealed decree was based on grave procedural irregularities in that:

a. in the operative part of the ruling, "two" proceedings had been mingled and decreed upon, which was inadmissible, and that

b. no decision had been made on the alternate petition of the Appellant; the petition to revoke the court orders contained in the decree of the Local Court dated 1-24-86 had not been decided upon.

For details, we refer to the "grounds for the further special appeal," page 5 and following = 960 and following of the files.

II.

The further special appeal is partially inadmissible; other than that, the time for its decision is premature. Therefore, a partial advance decision must be made in

accordance with the provision of § 301, German Code of Civil Procedure (ZPO), applicable analogously with the appeal proceedings (see Zoeller/Schneider, ZPO, 14th volume, 1984, § 575, marginal note 8). Inasfar as the appeal is admissible, the time for the decision is not ripe because the Trustee must be heard prior to the Division for Civil Matters of the Higher Regional Court taking a decision (Art. 103, paragraph 1, German Basic Law).

1. The Local Court and the Regional Court have arrived at the same results, as demonstrated by the wording of their decrees, so that a new, independent reason for appeal in terms of § 568, paragraph 2, German Code of Civil Procedure, is lacking.

2. Beyond the wording of § 568, subpara. 2 of the German Code of Civil Procedure, case law provides for the admissibility of a further appeal even in the event of concurrent prior decisions, if the appealed decision is based on a grave procedural irregularity (general opinion, confirmed by BVerfGE (Highest Federal Constitutional Court) 49, 255, 256). The appeal of the Appellant on this issue is partially founded.

a. No procedural violation exists in that the Regional Court connected two independent decisions in an outwardly uniform decree. No provision exists in the appeal law and in the general legal principles of proceedings under which this is a violation of the procedural rules. On the contrary, such practice is fairly widely used. It is generally accepted in contentious proceedings, for instance, to issue a decision on the main issue and the amount in controversy for reimbursement of legal fees jointly, with the consequence that the decision concerning the main issue must be appealed based on regular appeal proceedings, whereas the determination of the amount in controversy contained in the very same document must be appealed based upon an appeal proceeding especially provided for. Furthermore, the decision of the Regional Court to commence bankruptcy proceedings

with respect to the estate cannot be based on the lack of a cost decision, which was an oversight, being rectified in another decision.

For clarity's sake, the Division for Civil Matters of this Court has issued a separate decision on the special corrective appeal, i.e., in the court order proceedings 2 W 43/86, decree dated March 3, 1986.

b)

The appeal of the Appellant to the effect that the Regional Court did not decide on the court orders contained in the decree of the Local Court of 1-24-86, is founded. Whether the Division might have missed the petition of the special appeal or whether it might have considered a decision thereon non-essential, cannot be reliably concluded from the grounds for the decision. However, this is of no relevance. The decisive issue is that to the above extent, a decision which was petitioned for and required, was not made. This omission represents a violation of the procedures in that it violates Art. 103, subpara. 1 of the Basic Constitutional Law.

3.

This violation of the procedural rules by the regional court does not mean, however, that the special further appeal is admissible in its entirety. It is admissible only to the extent that the appealed decree can be based on this procedural defect.

a.

The prerequisite for admissibility of any redress is a grievance (see Zoeller/Schneider, German Code of Civil Procedure, marginal note 8 preceding § 511). The exceptional provision § 568, para. 2 of the German Civil Code is applicable to the procedure of a further appeal. In accordance therewith, not every grievance is sufficient to satisfy the redress requirements, but it must be a grievance arising in the second instance, forming the so-

called "new ground for appeal." However, in this respect, too, the procedural principle prevails that the admissibility of a redress is given only to the extent that the appellant has a grievance and wishes to eliminate the latter. For any prior decisions diverting therefrom in the operative part of the decision, this means that a partial appeal, even in application of § 568, subpara. 2 of the German Code of Civil Procedure, results only in a corresponding partial admissibility of the further complaint (see Zoeller/Schneider, German Code of Civil Procedure, § 568, marginal note 15). This limitation also applies inasfar as the law admits the further appeal due to a material procedural defect in the prior instance. To this extent the basic idea of § 568, subpara. 2, German Code of Civil Procedure, and the procedural principle of grievance as a prerequisite for redress must be complied with. The admissibility of the further appeal in the light of concurring prior decisions with grave procedural defects therefore applies only to the extent that the procedural defect could have affected the appealed decision. This qualification is expressed in that only those grave procedural defects will open the further appeal on which the appealed decision can be "based" (see Zoeller/Schneider, ZPO, § 568, marginal note 23).

b) The disregard of the first special appeal by the Appellant with respect to the court orders challenged by her contained in the decree of the Local Court dated January 24, 1986, can be of causal significance for those court orders only that remained undecided. The decision to commence bankruptcy proceedings is simply independent of whether the further court orders of the Local Court are founded or not. In no event can the commencement decision by the Local Court be based on the omission of a decision, whether the further court orders of the Local Court are founded or not. Therefore, a grievance of the Appellant based upon an alleged grave procedural defect is missing. This is the reason why the

further special appeal must be dismissed as inadmissible under § 568, subpara. 2, ZPO.

c.

Other procedural defects with reference to the decision to commence bankruptcy proceedings cannot be found in the files. In this context the Local Court did not overlook any petitions or statements.

d.

The further special appeal is partially inadmissible because of the court orders not decided on, as listed in the reasons for the appeal dated 2-20-86 on page 5 and following = Sheet 960 and following of the files.

aa. The reference of the Local Court to the duty to provide information on the part of the heirs of the decedent only reflects the provisions of § 100, Bankruptcy Act (KO) so that the procedural defect by the Landgericht cannot aggrieve the Appellant.

bb. The order issued to the Appellant to grant power of attorney substantiates a grievance. To this extent the further special appeal is admissible. Whether it is founded, will have to be decided in the concluding decision by the Division for Civil Matters of this Court after the Trustee has had an opportunity to comment.

cc. The statement made by the Local Court to the effect that the authority of the decedent's heirs to dispose had expired as of the effective date of the commencement of bankruptcy proceedings, reflects the provision of the law, i.e., only contains a correct instruction (§ 6, KO). To the extent that any rights of foreign heirs might be affected, this does not affect the Appellant, and she is lacking grievance.

dd. The reference to the expiration of powers of attorney with respect to the sale of encumbrance of foreign real property rights, may require re-examination; the

Division will therefore issue a decision thereon in its concluding decision.

ee. The reference to the bankruptcy sequestration also extending to the use and the proceeds of property located abroad reflects a legal consequence and does not constitute a grievance.

ff.

The substantiation of the decision on a mail, telephone and telegraph ban shall be ruled on in the concluding decision.

4.

The decision as to costs and the amount in controversy of the appeal shall be subject to the final decision.

Dr. Schmitz Dr. Pretzell Dr. Schneider

(Court Seal) Executed: Signed (Court Clerk)

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
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Translator/Interpreter
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APPENDIX D

Certified German-English Translation

OBERLANDESGERICHT KOELN
COLOGNE HIGHER REGIONAL COURT
FEDERAL REPUBLIC OF GERMANY
COURT OF APPEAL

DECREE

File No. 2 W 34/86
19 T 58/86 LG Koeln (Cologne Regional Court)
71 N 641/85 AG Koeln (Cologne Local Court)

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Trustee in bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne, FRG,

involving

Mrs. Ingeborg Skowronek, Neusser Strasse 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel for the Appellant:

Dr. Hartstang and colleagues, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Higher Regional Court Judges Dr. Schmitz, Dr. Schneider and Dr. Kuhne, has on April 28, 1986, upon the special further appeal (subject to a time limit) of the Appellant dated February 20, 1986, filed with the Court of February 21, 1986, against the decision of the 19th Division of Civil Matters of the Cologne

Regional Court dated February 17, 1986, held and decreed as follows:

1. Unless it has already been dismissed by the decision of the Division of Civil Matters of March 3, 1986, the special further appeal shall be dismissed on its merits.

2. The costs of the further appeal proceedings shall be borne by the Appellant.

3. For purposes of a preliminary cost calculation and subject to correction in the course of the proceedings, the amount in controversy of the appeal shall be set at DM (German Marks) 5 million.

Reasons for the Decision

I. By decree of the Cologne Local Court dated January 24, 1986, the bankruptcy proceedings re the estate of the late Heinz Guenter Kaussen, M.B.A., deceased in April 1985, were commenced and court orders given. In its decree of March 3, 1986, the Division of Civil Matters already partially decided on the appeals filed against the latter. For details, please refer to said decision.

The Appellant was given an opportunity to answer the pleading of the Trustee in Bankruptcy of April 7, 1986. Said pleading was sent to her counsel on April 11, 1986. No answer thereto was filed by the date of the decree of the Division of Civil Matters.

II. The legitimacy of the following orders is now up for decision:

—Duty of the Appellant to grant powers of attorney with respect to the property located abroad;

—Expiration of existing powers of attorney;

—Ban on mail, telephone and telegraph communications.

To the above extent, the special further appeal is dismissed on its merits.

1. The Division of Civil Matters agrees with the opinion of the previous instances that the Appellant has the duty to grant the Trustee power of attorney with respect to the real property of the late H.G. Kaussen, M.B.A., located abroad.

The dispute as to whether the so-called principle of territoriality or the so-called principle of universality shall prevail in the bankruptcy proceedings, i.e., whether the bankruptcy commenced in the Federal Republic encompasses the entire property of the Debtor—irrespective of its situs—, was in recent rulings of the Federal Court of Justice ruled on in favor of the principle of universality, which the Division of Civil Matters of this Court agrees with (BGHZ 68, 16; further references in Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, 10th Volume, 1986, Paragraphs 237, 238 Rn. (marginal number) 17, and BGH (Federal Court of Justice), EWiR, Paragraph 237, Bankruptcy Act 1/85, 605 (Merz) = ZIP, 1985, 944). This means:

In addition to the domestic property, the Debtor's bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee (BGHZ 68, 17). Any duties of the Debtor in handling the bankruptcy proceedings shall therefore also include the property located abroad.

In administering and using the bankrupt estate, the Debtor is subject to a large number of cooperative duties. He shall do everything required in order for the Trustee to fulfill his duties under Paragraph 117, subpara. 1 of the Bankruptcy Act. He shall inform the Administrator, the committee of creditors and, upon the court's order, the creditors' meeting of all circumstances concerning the proceedings (Paragraph 100, Bankruptcy Act), and he shall be responsible, unlike the several debtor in an execution (a foreclosure), not only for tolerating the foreclosure of his property, but for the active surrender of the

bankrupt estate. Paragraph 117 of the Bankruptcy Act provides for a claim of surrender by the Trustee against the Debtor and obligates the latter to initiate any action required for the Trustee to fulfill his duty of taking possession of the bankrupt estate (Boehle-Stamschraeder/Kilger, Commentary on Bankruptcy Act, 14th volume, Paragraph 117, marginal no. 2; Jaeger-Weber, commentary on Bankruptcy Act, 8th volume, Paragraph 117, marginal no. 6 and following; and Hanisch in ZIP, 1980, p 170 and following). Accordingly, the foreclosure against the Debtor on the basis of the decree to commence bankruptcy proceedings is a surrender foreclosure in terms of Paragraphs 883 and following, Code of Civil Procedure (ZPO) (Jaeger-Weber as cited, marginal no. 13, with further references). This means imperatively that the Debtor is also obligated to enable or facilitate the Trustee's duty to fulfill his responsibilities under Paragraph 117, subpara. 1, Bankruptcy Act, by granting powers of attorney. As the Trustee has the duty, however, to use the Debtor's property located abroad, the further conclusion is imperative that the Debtor has the duty to grant powers of attorney accordingly. This appears to be the unanimous opinion of the literature (see documentation by Kuhn/Uhlenbruck, Bankruptcy Act, Paragraph 117, marg. no. 13a, and Kuhn/Uhlenbruck/Lueer as cited, Paragraph 237 and 238, marg. no. 65).

To the extent ascertainable, only the Koblenz Higher Regional Court has a legal opinion contrary thereto (KTS 1980, 68). The Koblenz Higher Regional Court also assumes that the Debtor's property located abroad is part of the bankrupt estate and that the Debtor's duty to provide information under Paragraph 110, Bankruptcy Act, extends to the Debtor's property located abroad. In the opinion of the Koblenz Higher Regional Court, however, a provision is lacking which would obligate the Debtor to grant power of attorney beyond the duty to provide information. In view of the comprehensive duty of the Debtor to cooperate, however, such a specific provision is

not required so that because of its lack, one cannot conclude that the Debtor is not obligated to grant power of attorney. In fact, the reverse is true. Particularly in view of the difficulties in practice which the use of the property located abroad presents (also see BGHZ 68, 17/18; Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, Paragraphs 237, 238, marg. no. 7 and following) and which the Trustee may be confronted with, the basic duty of the Debtor to cooperate comes to bear. It is beyond any doubt that the granting of a power of attorney to the Trustee for the disposition of property located abroad represents a considerable facilitation in his compliance with his duties under Paragraph 117, subpara. 1, Bankruptcy Act.

The fact that the Trustee already has the right of administration and disposition of the bankrupt estate by virtue of the law (Paragraph 6 of the Bankruptcy Act) and such right extends to property located abroad, does not contradict the above. As the principle of universality is not recognized by all states, the Debtor cannot invoke that the granting of a specific power of attorney is unnecessary under German law. The actual circumstances encountered by the Trustee determine the extent to which the Debtor has the duty to cooperate in order to enforce claims for obtaining and using property located abroad covered by the bankruptcy proceedings. If the presentation of the adjudication order does not suffice for evidence of authority of the Trustee, then the Debtor must take all necessary steps of his own so that the intent of Paragraph 6 of the Bankruptcy Act becomes effective abroad as well.

2. A further legal consequence is derived from the above in that the rights of the heiress or any other person authorized to dispose of the property constituting part of the estate has expired, which includes the property located abroad.

3. The ban on mail, telephone and telegraph communications ordered by the Local Court is provided by Para-

graph 121, Bankruptcy Act. No considerable legal concerns with respect to this order are apparent.

4. The decision re costs is based on Paragraph 97, subpara. 1, Code of Civil Procedure (ZPO).

The Division of Civil Matters has deemed it necessary to determine an amount in controversy of the appeal at this time based entirely on a free estimate in order to permit preliminary cost accounting.

Dr. Schmitz Dr. Kuhne Dr. Schneider

(Seal of the Cologne Higher Regional Court)

Executed by:
(Signed)
Court Clerk

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
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APPENDIX E

Certified German-English Translation

Federal German Constitutional Court
—1 BvR 574/86

In the Proceedings
Regarding
The Constitutional Complaint

Brought by

1. Mrs. Ingeborg Skowronek
   Bodinusstrasse 5, Cologne 60, Federal Republic of Germany (FRG),
2. the minor Beatrix Kaussen,
3. the minor Margret Kaussen,
4. the minor Eva-Maria Kaussen,
5. the minor Hilde Kaussen,

—the parties 2 through 5 being represented by their mother, the party 1—

—Counsel: Dr. Gerhard Hartstang and
Dr. Thomas Grote,
Attorneys-at-Law,
Zeunerstrasse 32, Essen-Bredeney, FRG—

against a) decree issued by the Cologne Higher Regional Court on April 28, 1986—2 W 34/86—,

b) decree issued by the Cologne Higher Regional Court on March 3, 1986—2 W 34/86—,

c) decree issued by the Cologne Regional Court on February 17, 1986—19 T 58/86—,

d) decree issued by the Cologne Local Court on January 24, 1986—71 N 641/85—

and application to issue an injunction,

the 2nd Panel of the First Division of the Constitutional Court, by Court Vice President Herzog and Judges Katzenstein and Henschel, has on June 6, 1986, unanimously decreed and held as follows:

> The Constitutional Complaint shall not be accepted for decision by this Court, in part as being inadmissible, in part as lacking an adequate chance of being successful. Likewise, the application for the issuance of an injunction will not be accepted.

Grounds:

Pursuant to § 90, paragraph 2, sentence 1, BVerfGG; (Law on Proceedings of Constitutional Court), it is a prerequisite of a constitutional complaint that all means to appeal have been exhausted. This prerequisite has not been complied with by the parties 2) through 5). In contrast to party 1), the parties 2) through 5) did not appeal the decree issued by the Cologne Local Court in the manner provided by law. The Constitutional Complaint therefore proves to be inadmissible.

The Constitutional Complaint is also inadmissible to the extent it is directed against the institution of the bankruptcy proceedings and those other decrees as affirmed by the decree issued by the Cologne Higher Regional Court on March 3, 1986, which decree is also subject to this complaint. In that regard, the party 1) failed to file the Constitutional Complaint within the time period mandated by § 93, paragraph 1, BVerfGG. The one-month period started running prior to April 28, 1986, the date on which the decree was issued by the Cologne Higher Regional Court, because the preceding decree by that court already qualified as a decision partially concluding the proceedings.

To the extent that the Constitutional Complaint is admissible, it is without merit. The challenged decrees

do not violate constitutional rights. The decrees remain within the restraints imposed on the judge by the constitutional principle of separation of powers in his interpretation of the law (Art. 20, paragraph 3, GG (Federal German Constitution)). By consistent practice, the Constitutional Court has recognized the courts' duty and right to further develop the law (*See* BVerfGE 65, 182 [190], as amended). The limits are exceeded only when a clear legislative objective to the contrary is present (*See* BVerfGE 9, 89 [102]). This is not case. According to the law, the Cologne Higher Regional Court was allowed to base its interpretation of the law primarily on the so-called universality principle, which is explicitly codified in § 1, paragraph 1, KO (Federal German Bankruptcy Code) (*See* BGHZ 88, 147 [150] as amended). The Bankruptcy Code cannot unequivocally be read to confine the debtor's duties to compliance with the obligations specifically stated in §§ 100, 101, KO. The purpose of the bankruptcy proceedings and the bankruptcy trustee's comprehensive authority to realize assets (§ 117, paragraph 1, KO) imposes a general obligation on the debtor to confer power of attorney inclusive of assets located in a foreign country.

The Constitutional Court is not to examine whether such interpretation by the Cologne Higher Regional Court is "correct" in terms of ordinary civil law. While the Koblenz Higher Regional Court shares the opinion advocated by the party 1), the Cologne Higher Regional Court, contrary to the complainant's position, was not bound by such opinion. Inconsistent interpretation of the law by different courts does not constitute a violation of Art. 3, paragraph 1, GG (BVverfGE 1, 332 [345]). A violation of the principle of equal treatment could only be taken into consideration if, according to sound interpretation of the principles expressed by the Constitution, such defective application of law were incomprehensible and likely to be based on inappropriate considerations.

(*See* BVerfGE 59, 128 [160 et seq.]). There is, however, no indication to that effect.

Art. 6, paragraph 1, GG has also not been violated. The separation of the complainant from her children was based on her own independent decision. Although, according to the complainant, her being abroad is the result of the order to confer power of attorney, this is only an unintended side-effect of the institution of the bankruptcy proceedings from which Art. 6, paragraph 1, GG does not afford constitutional protection. (*See* BVverfGE 6, 55 [77]; 12, 151 [176]).

Furthermore, the obligation to confer power of attorney does not violate complainant's constitutional right granted by Art. 14, paragraph 1, GG. The Constitutional Court has already held with respect to § 6, paragraph 1, KO that this provision defines the legal substance of property in terms of Art. 14, paragraph 1, sentence 2, GG (*See* BVerfGE 51, 405 [408]). This also holds true with respect to the obligation to confer power of attorney, which obligation has been lawfully derived by the competent courts from the law. In addition, the complainant's just concerns are protected by the opportunity to bring suit in order to obtain a separation or substitutional separation of assets from the estate in the event that any compulsory power of attorney should include assets which are not part of the estate (*See* §§ 43, 46, KO).

Furthermore, the order to impose a mail, telephone and telegraph ban does not violate Art. 10, paragraph 1, GG. The order is based on § 121 KO, which is a provision clear of any constitutional misgivings. The complainant failed to submit any facts which might have cast doubt on the legality of the order in her particular case. Besides, should such facts occur, she is entitled pursuant to § 121, paragraph 2, KO to file a petition at any time to have the court remove or limit the ban.

Finally, the Higher Regional Court with its decree of April 28, 1986, did not violate the complainant's right to a fair trial. In view of the fact that the trustee's brief of April 7, 1986, included only legal considerations which did not necessitate the complainant's supplying additional information to her counsel, a period of approximately two weeks prior to the decision by the court is still deemed appropriate.

This decree cannot be appealed.

Dr. Herzog Dr. Katzenstein Dr. Henschel

(Court Seal) Executed: Signed (Court Clerk)

Karlsruhe, June 11, 1986.

Certified to be a faithful and complete translation of the German text.
December 8, 1987

/s/ Anne Harland

ANNE HARLAND
Translator
Accredited by U.S. Department
of State
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Atlanta, GA 30306

APPENDIX F

CANADA

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

NO.: 500-11-001657-861

SUPERIOR COURT

(BANKRUPTCY DIVISION)

PRESIDING: THE HONOURABLE MR. JUSTICE JOHN E. GOMERY, J.S.C.

IN THE MATTER OF THE BANKRUPTCY OF:
THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor

— and —

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK AKTIENGESELLSCHAFT,
Petitioner

JUDGMENT

(Rendered orally July 3, 1986)

The petitioning creditor, a German bank, asks by its amended petition made under the authority of Section 28 of the Bankruptcy Act that an interim receiver be appointed to take possession of the assets of the estate of the late Heinz Gunther Kaussen, consisting of eleven (11) apartment buildings in Montreal. It is proposed that the interim receiver be empowered to control these assets and the rentals deriving from them, and to make all necessary disbursements, until such time as a final

adjudication has been made of the pending petition for a receiving order which the Petitioner has filed against the estate.

Both the petition for a receiving order and the petition for the appointment of an interim receiver are vigorously contested by counsel representing Mrs. Ingeborg Skowronek, who has accepted the Estate of the late Mr. Kaussen under benefit of inventory. Her written contestation of the bankruptcy petition and the evidence heard during seven days of enquête have raised a number of important factual and legal issues, which will only be decided after counsel for both parties have submitted written memoranda, followed by further oral argument scheduled for July 24th. There will then be a period for deliberation and the preparation of a written Judgment. All of which is to indicate that there will probably be a delay of anywhere up to two months before a Judgement on the merits of the bankruptcy proceedings can be anticipated. Given the complex legal issues and the value of the property and assets involved in this litigation, one must also be conscious of the possibility of an appeal. Therefore, if an interim receiver is appointed, his duties will extend beyond the more usual period of a week or two prior to a decision being rendered on a pending bankruptcy petition.

Section 28 authorizes the appointment of an interim receiver if it is shown to be necessary for the protection of the estate.

The proper interpretation to be given to these words has been the subject of a number of judicial decisions and there is no controversy between the parties as to the principles which apply. A leading case is *Re Stuart and Sutterby* 11 C.B.R. 1, where it was held that:

> ". . . the following essentials are necessary, although the facts may vary in almost every case:

> (1) it must be shown that a receiving order is almost certain to be made eventually, insofar as it can be determined at that stage what disposition will be made of the petition;
>
> (2) that unless an interim receiver is appointed to take possession to preserve the assets, there is grave danger that the assets existing on the date of the appointment will not all be recovered or be properly accounted for, when a receiving order is made."

To this may be added the headnote in *Re Big Eddy Shops Ltd.* (1977) 24 C.B.N. 90:

> "Section 28(1) of the Bankruutcy Act empowers the Court, in the exercise of its discretion, to make an interim receiving order, the cardinal principle being that the Court must be satisfied that it is necessary for the protection of the estate. It must be a matter of judgment in each case whether, on all the facts of the case presented to the Court, the conclusion is reached, judicially, that the appointment of the interim receiver is necessary to protect the interests of the estate, not only for the benefit of the applicant but all the creditors."

The facts giving rise to these proceedings may be summarized as follows.

The late Mr. Kaussen died on the night of 14-15 April 1985 in Cologne, Federal Republic of Germany, bequeathing his Estate by last will and testament to Ingeborg Skowronek with whom he had lived for many years. At the time of his death Mr. Kaussen was the owner of a very large number of buildings and properties in Germany, the United States of America and Canada. I will say more about the values of these properties later: for now it suffices to say that the value of the deceased's assets in Canada and the United States exceeds by a comfortable margin the liabilities, both secured and un-

secured, owing to creditors in those two countries. In Germany where the greater number of the deceased's investments had been made, the liabilities greatly exceed the assets.

Before his death Mr. Kaussen had encountered increasing difficulties in managing his real estate empire. Several banks to whom he was indebted had called their loans and were threatening foreclosure proceedings against his properties. Following his death and after obtaining probate of his will, Mrs. Skowronek attempted for a time to manage his properties and to make repayment arrangements with his principal creditors, but it eventually became apparent to her that the major creditors would not give her the time that she needed and she requested administration of the estate in accordance with German law. This was granted by a Judgment rendered in Cologne on July 17, 1985 and one Herman Haeck was named administrator of the Estate. After evaluating the situation Mr. Haeck requested sequestration of the estate, as a preliminary to a determination that the Estate was overindebted and subject to the Bankruptcy Code of Germany. This was ordered by the Court in Cologne on November 15, 1985 and Dr. Klaus Hubert Görg was named sequestrator. A series of evaluations of the assets were made by Dr. Görg and by others, and the liabilities of the Estate were also assessed, all of which indicated that the Estate was overindebted, which requires that it be placed in bankruptcy according to German law. On January 24, 1986 the Court of first instance in Cologne determined that Mr. Kaussen's Estate was bankrupt and named Dr. Görg as the administrator of the bankrutcy, an appointment which was confirmed at the first meeting of creditors on March 7, 1986.

A few figures should be given to indicate the size and importance of the German bankruptcy. I will give the figures in Deutschmarks. The proof has shown that a Deutschmark is worth approximately $0.60 in Canadian funds.

The real estate in Germany consisting of about 5,000 units is worth an estimated 200 million DM, although Dr. Görg fears that there may be less than that amount on realization. Against these properties are secured claims of more than 250 million DM. Foreign assets, that is to say those properties located in Canada, the U.S. and a residential property in Ireland, net of the claims of secured creditors, are worth 42 million DM. Overall in round figures the worldwide assets are estimated to be worth 280 million DM and the liabilities amount to 400 million DM leaving a shortfall of 120 million DM, or about $72,000,000.00 Canadian.

Mrs. Skowronek, since the appointment of Dr. Görg as sequestrator, has not offered him the co-operation and assistance which the German law requires of her, and has demonstrated an increasing interest in the Estate's North American properties, in the apparent hope that she will be able to salvage something for herself and her children from the equity in those properties. With this in mind she has accepted the succession under benefit of inventory in accordance with the civil law of this Province, by a Declaration made before Notary Paul Dorval at Montreal registry office on January 29, 1986. She has recently established her place of residence in this district and advises the Court that she intends to make her life here.

The Estate's assets in Quebec consist of eleven (11) multi-dwelling buildings in Montreal containing approximately 1,600 units which are currently leased to tenants who pay an aggregate monthly rental of about $600,000.00. All of the buildings at the time of the death of Mr. Kaussen were mortgaged; the balances outstanding totalled approximately $16,000,000.00. An evaluation of these properties has been prepared as of May 1, 1985 which indicates they were then worth $32,775,000.00. It has been updated as of June 1, 1986, and the value appears to have increased to $37,650,000.00. Mrs. Skow-

ronek recently received an offer to purchase them for the sum of $40,000,000.00.

Since her arrival in Canada in the autumn of 1985 Mrs. Skowronek has taken steps to reorganize the administration of the buildings, making important changes in the arrangements that were in effect prior to Mr. Kaussen's death. She has discharged the administrator, a company owned by Mr. Maurice Archambault, and has substituted in his place a corporation named 147362 Canada Inc. which she caused to be incorporated in 1985 at a cost of $21,200.00. She then sold the shares of 147362 Canada Inc. to a certain Mr. Bogyay of Waterloo, Ontario, and gave a mandate to the company to administer the buildings belonging to the Estate for a fee of 5% of the gross rentals. Thus the administration fee will be about $30,000.00 per month which contrasts sharply with the fee of 2% of gross rentals that was previously paid to Mr. Archambault's management company. Mrs. Skowronek and her employees are very critical of Mr. Archambault's management, but it is significant that 147362 Canada Inc. has not yet produced any appreciable increase in the rentals produced by the buildings, or effected any real decrease in the cost of operating them. No explanation has been offered to the Court as to why an increase of about $18,000.00 per month in administration fees was agreed to. Mr. Bogyay was not heard as a witness for reasons of health.

In March Mrs. Skowronek embarked upon a program of repayment of the existing mortgages with funds which she has borrowed for this purpose from The Mutual Trust Company, assigning to Mutual Trust as collateral security for these borrowings the rights which she acquired by way of subrogation upon payment of the existing mortgages. Article 1156(4) of the Civil Code provides that subrogation takes place by law in favour of a beneficiary heir who pays a debt of the succession with his own moneys. There is an interesting legal ques-

tion whether that article extends to the payment of a mortgage with borrowed funds using as security for such borrowings the assets of the succession, but that is a question that can be left for determination at another time. The repayment program has been pursued in spite of the institution of the present bankruptcy proceedings which commenced by the service of the petition on June 6: the subrogations and assignments all occurred after that date, although the negotiations with the mortgage creditors had commenced about two months earlier.

Mrs. Skowronek explains that these transactions are motivated by her desire to avoid a repetition of what happened in Germany, and by her wish to have control of the assets of the Estate together with a degree of flexibility in arranging for the payment of what is owed to Canadian creditors. It is more likely that her real preoccupation is her desire that the Canadian assets of the Estate should not be swallowed up in the bankruptcy in Germany, and that at least a portion of them be retained for her benefit.

This Judgment will not analyze in detail the subrogations and assignments that have taken place but it is noted that in each case Mrs. Skowronek has borrowed more than the amount needed to pay off the capital balance of the loan, the excess being employed to pay off overdue instalments, interest on overdue instalments, taxes and "mortgage commitment fees" charged by Mutual Trust. This latter item alone amounts to more than $90,000.00 to date and it is apparently Mrs. Skowronek's intention to charge them as a cost of the administration of the Estate. These fees would not have been necessary if she had simply prolonged the existing mortgages, which the mortgage lenders were willing and anxious to do.

The Estate derives no financial benefit from this mortgage repayment plan, and the mortgage commitment fees have increased the amount needed to discharge the mortgages, at the expense of the unsecured creditors. The

lower interest rates charged by Mutual Trust are of no benefit to the Estate either, since it will continue to pay Mrs. Skowronek the original interest rate on the mortgage loan she has paid off, whereas she will in turn pay the lower rate to Mutual Trust, pocketing the difference.

The legality of all of this is not a matter which the Court is called upon to decide at this stage of the proceedings, but a few remarks are in order. First of all, what she has done and proposes to do with respect to the remaining mortgages may be contrary to Section 26(2) of the Bankruptcy Act which prohibits the representative of a deceased debtor from making any payment or transferring any property until the bankruptcy petition has been disposed of. Secondly, the idea that a beneficiary heir is entitled to profit in any way from his administration of the Estate's property is contrary to the spirit of the civil law respecting the acceptance of Estates under benefit of inventory. Faribault *Traité de Droit civil du Québec*, Volume 4, Wilson & Lafleur, Montréal, at page 344 says that the administration of the succession by the beneficiary heir is gratuitous, and this is echoed by Mignault (*Le Droit civil Canadien* Vol. 3, Montréal, Théoret at page 375.)

In her contestation of the bankruptcy proceedings Mrs. Skowronek seeks a finding by the Court that the proceedings are unfounded because they are not directed against her as beneficiary heir, because the Petitioner has no right under German law to claim the payment of a sum of money from the estate for so long as the German bankruptcy proceedings are pending and because no act of bankruptcy in Canada has occurred. She urges upon the Court an interpretation of the Bankruptcy Act which would exclude from its application an Estate which has been accepted under benefit of inventory and intends to argue that the assets of the late Mr. Kaussen here in Canada are subject to the claims of his Canadian creditors only, and to a rateable proportion of his foreign creditors only.

It seems that there are only a few decisions of the Canadian Courts which give useful assistance on how to determine the rights and obligations of creditors in complex international bankruptcies of this kind. The Bankruptcy Act itself is not very helpful in directing the Court as to the position it should take with respect to a foreign trustee named by the Courts of the country where the deceased had his domicile. The legal difficulties are even greater due to the fact that the principal assets of the debtor are immoveable properties located in this jurisdiction, but which were purchased with funds taken out of his foreign patrimony.

These are matters which will have to be dealt with upon the merits of the petition for a receiving order. The question for determination now is whether or not the protection of the assets of the Estate requires the intervention of an interim receiver.

Petitioner has proved that the Estate is indebted to it for some 38 loans contracted in Germany in the sum of 65,849,546. DM as of April 30, 1986. It values the security which it has against German real estate at 21,500,000. DM, leaving an expected unsecured claim of about 44,500,000. DM or $26,700,000.00 Canadian. It has additional claims resulting from an additional 300 loan contracts, which are not proved.

A representative of Deutsch Hypothakenbank Frankfurt-Bremen A.G. testifies that it made some 95 loans to the late Mr. Kaussen, all of which are in default, and that as of May 30, 1986 it is owed 33,237,671. DM, against which there is security valued at 23,661,065. DM, so there is an expected unsecured claim of 9,576,606. DM, or $5.7 million Canadian.

A third German bank, Deutsch Kreditbank für Banfinanzierung A.G. is owed 4,539,000. DM or about $2,723,400.00 Canadian, against which it has security for only a minor part of its claim.

Mrs. Skowronek acknowledges that, as beneficiary heir and residuary legatee of the debtor, she is unable to pay these claims.

In the light of the bankruptcy Judgment already pronounced in Germany, the admitted inability of Mrs. Skowronek to pay the German liabiilties and the insolvency of the Estate taken as a whole, the Court is of the opinion that it should accept that Petitioner has made a prima facie case on its petition for a receiving order and that an eventual bankruptcy here is probable. The next question is whether the assets and revenues of the Estate require protection, for the period of time necessary to sort out the legal questions raised by the contestation.

There have been several instances of use of the rental revenues for purposes other than those required for the administration of the apartment buildings. Mrs. Skowronek has reimbursed herself out of these revenues for the costs of her travels to and from Germany, San Francisco and Atlanta where other assets of the Estate are located. These costs exceed $6,000.00. Although visits to her legal advisers in these cities may be necessary and advisable for a better understanding of her legal position, the Court fails to see how such travelling is in the interests of the creditors generally. Having accepted the estate under benefit of inventory, Mrs. Skowronek should have kept uppermost in her mind that she is acting in a fiduciary capacity towards the creditors.

Before acquiring a place of residence for herself in the Montreal area Mrs. Skowronek stayed in a local hotel and charges amounting to $9,557.00 were paid from the rental revenues. And she has advanced out of these same revenues to counsel representing her in these proceedings an amount of $240,000.00. She has paid her lawyer in Germany $28,205.00. Some of these disbursements for legal expenses may be related to the necessary costs associated with her administration of the assets of the

Estate, but the greater proportion of them must have been used in her personal interest. Such expenditures are unjustified. They indicate a disregard on the part of Mrs. Skowronek of her obligations towards the creditors of the Estate, whether they are located here or elsewhere. It is improper for her to benefit in any way from the assets of the estate until the claims against it have been dealt with. Although the payment of personal living and travelling expenses may represent only a small proportion of the revenues that are being received, the revenues do not exceed the expenses by such a great margin that additional costs of this kind are of no importance. As far as legal fees are concerned, she should finance them from her own resources like any other litigant, for the time being at least.

Considering the dissipation of the assets resulting from the administration fees being charged by 147362 Canada Inc., the benefits being derived by Mrs. Skowronek from the payment with subrogation of the mortgages, and the personal benefits she has received by way of travel, living and legal costs paid on her behalf, there is reason to fear that the assets of the estate will be misapplied in the future in a similar manner. The appointment of an interim receiver should prevent this. No prejudice to the Estate by such an appointment will take place; this is not a case which is comparable to that of a businessman or merchant whose business and reputation might suffer from the appointment of a receiver. It is desirable that constraints be placed upon the present administration of the real estate by Mrs. Skowronek and her agents. As was pointed out in the annotation to the decision of the Supreme Court of Ontario in *Re Imperial Broadloom Company* (1978) 29 C.B.R. 113, the appointment of an interim receiver is a protective measure and does not divest the debtor of his assets. It does not enable the receiver to interfere unduly in their administration. He is there to conserve the assets until the proceedings have been decided.

The petitioning creditor is a foreign bank and there is no evidence that it has any assets in this jurisdiction which would be available to satisfy an adjudication for damages, in the event that the petition for a receiving order is dismissed. I take it for granted that Mrs. Skowronek would wish to make some sort of claim against it in that event. Section 28 of the Act empowers the Court to require an undertaking with respect to possible damages from the Petitioner, and this is an appropriate case for the imposition of such an undertaking. Therefore it will be a condition of the present Judgment that a security in accordance with Rule 16 be furnished in the amount of $600,000.00 within ten days. In the meantime the interim receiver will be allowed to enter into possession of the Respondent's assets and security in accordance with Rule 16 in the sum of $600,000.00, as a guarantee for the payment of any damages caused to the Debtor in the event that the petition for a receiving order is dismissed, the whole within a delay of ten days from the date of the present Judgment, failing which the appointment of the interim receiver shall be immediately vacated;

ORDERS provisional execution of the present Judgment notwithstanding any appeal and without security except as hereinabove ordered.

With costs to follow suit.

/s/ John H. Gomery
JOHN H. GOMERY
J.S.C.

Me Bernard Woloshen, Q.C.,
Me Ian Rudnikoff,
Attorneys for the Petitioner

Me Mortimer Freiheit,
Attorney for the Debtor-Respondent.

TRUE COPY.

/s/ [Illegible]
Deputy-Registrar S.C.M.

APPENDIX G

COURT OF APPEAL

PROVINCE DE QUÉBEC
DISTRICT OF MONTREAL

No. 500-09-001253-863
500-11-001657-861

The eighth Day of February one thousand nine hundred and eighty-eight

CORAM: THE HONOURABLE McCARTHY
CHOUINARD
LEBEL

IN THE MATTER OF THE BANKRUPTCY OF:

THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor/Appellant

and

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK AKTIENGESELLSCHAFT,
Petitioner/Respondent

THE COURT, on the appeal from a judgment rendered by the Superior Court (the honourable John H. Gomery), District of Montreal, on September 26, 1986, ordering the issuance of a receiving order under the *Bankruptcy Act*, R.S.C. 1970, c. B-3, against the estate's property;

COUR D'APPEL

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No. 500-09-001253-863
500-11-001657-861

IN THE MATTER OF THE BANKRUPTCY OF:

THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor/Appellant

and

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK
AKTIENGESELLSCHAFT,
Petitioner/Respondent

CORAM:

MCCARTHY
CHOUINARD
LEBEL, JJ.C.A.

OPINION OF MCCARTHY, J.A.

This an appeal by the estate of the late Heinz Gunther (Gunter) Kaussen from a judgment of the Quebec Superior Court which ordered the issuance of a receiving order under the *Bankruptcy Act*, R.S.C. 1970, c. B-3, against the estate's property.

Kaussen died in Cologne, Federal Republic of Germany, where he was domiciled, on April 14, 1985. His will named Mrs. Ingeborg Skowronek, with whom he had been living for thirty years and by whom he had had four children, as his sole heir. His estate included what the Su-

perior Court judge describes as "an immense real estate empire", situated for the most part in Germany but also in other jurisdictions, including Quebec. That empire had been experiencing serious financial difficulties in Germany prior to Kaussen's death and these difficulties continued. Mrs. Skowronek, having failed to make appropriate arrangements with the German banks which were the principal creditors of the estate, applied to the Cologne court to have an administrator appointed to the estate. On July 14, two administrators, both accountants, were appointed. On November 13, the administrators applied to the Cologne court "for the opening of bankruptcy proceedings" against the estate on the ground of "over-indebtedness". Two days later, a sequestrator, Dr. Klaus-Hubert Görg, was appointed; subsequent decisions of the Cologne court made it clear that the foreign property of the estate was to be included in the sequestration. On December 13, Dr. Görg informed the Cologne court, over the objections of Mrs. Skowronek, that there were grounds for bankruptcy. Finally, on January 24, 1986, the Cologne court declared the estate bankrupt and provisionnaly appointed Dr. Görg as trustee. All of these proceedings were taken, of course, under German law. In the meantime, in November 1985, Mrs. Skowronek had come to Montreal, where she had assumed the administration and control of the real estate situated in Quebec. On November 21, 1985, she had executed here a notarial deed accepting under benefit of inventory "the estate of the said HEINZ GUNTER KAUSSEN".

In June 1986, the respondent, one of the German banks, alleging that a debt equivalent to $39,670,791.24 (Canadian) was owing by Kaussen, filed a petition for a receiving order against his estate under Canadian law, in the Superior Court. Around the same time, Dr. Görg instituted an action against Mrs. Skowronek in the Quebec Superior Court, an action by which he apparently seeks "exemplification of the decisions of the Cologne

court". This action, I understand, is still pending. We are seized, as mentioned above, with the appeal from the judgment which granted the petition for a receiving order.

Under the *Bankruptcy Act* a creditor may file a petition for a receiving order against a debtor if the debt owing to the creditor amounts to $1,000 and the debtor has committed "an act of bankruptcy" (s. 24(1)) within the six months prior to the filing of the petition (s. 25 (1)). The debtor must have been residing or carrying on business in Canada when he committed the act of bankruptcy (s. 2). The creditor need not have been residing or carrying on business in Canada; he need only have a claim provable under the Act (s. 2).

In the present case, the Superior Court judge concluded that the Kaussen estate had committed, within the preceding six months, the acts of bankruptcy described as follows in section 24(1) of the *Bankruptcy Act*:

> "24(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> > (a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;
> >
> > .....
> >
> > (j) if he ceases to meet his liabilities generally as they become due."

The judge concluded that the declaration of bankruptcy by the Cologne court was an assignment within the meaning of section 24(1)(a). He also concluded that even though the estate had not ceased to meet its liabilities generally as far as Canadian creditors were concerned, section 24(1)(j) applied because the estate had ceased to pay its principal creditors, the German banks.

The estate argues that, by taking into account the declaration of bankruptcy by the Cologne court, the judge gave effect to a foreign judgment, contrary to the rule of Quebec law set forth in article 178 C.C.P. I cannot agree. The judge did not give effect to a foreign judgment; he simply took cognizance, in accordance with the provisions of section 24(1)(a), of something done "elsewhere". The estate also argues, however, that section 24(1)(a) refers to a *voluntary* act by a debtor and points out that Mrs. Skowronek contested the declaration of bankruptcy by the Cologne court. If Mrs. Skowronek's application to have an administrator appointed to the estate is to be considered such voluntary act, the estate argues, that occurred more than six months before the filing of the petition for a receiving order. The same argument is made regarding the application by the administrators "for the opening of bankruptcy proceedings". The latter arguments may perhaps have some merit. However, I find it unnecessary to deal with them because, as indicated below, I have concluded that whether or not there was an act of bankruptcy within the six-month period under section 24(1)(a), there was certainly an act of bankruptcy within such period under section 24(1)(j).

Section 24(1)(j), unlike section 24(1)(a) (and several other subsections of section 24(1)), does not explicitly state that the act of bankruptcy described therein may take place "in Canada or elsewhere". The judge concluded nonetheless that the legislator cannot have intended the "absurd result" of allowing a debtor carrying on business in Canada to avoid bankruptcy by paying his Canadian creditors while ceasing payments to foreign creditors. I agree. Under the *Bankruptcy Act*, as already noted, a creditor need not reside or carry on business in Canada. Nor need a claim provable have arisen in Canada (s. 95). Property includes property "situated in Canada or elsewhere" (s. 2). For the purpose of obtaining possession of and realizing upon a bankrupt's

property, a trustee has power to act as such "anywhere" (s. 12(6)). With those provisions in mind, I find it impossible to limit s. 24(1)(j) to liabilities owing to Canadian creditors. In the present case, the Kaussen estate had ceased to pay the German banks more than six months prior to the filing of the petition for a receiving order. However, the trial judge concluded that this was "a continuous default which also extended into the six-month period". In view of the bankruptcy proceedings in Germany, it was pointless, he said, for the respondent and the other banks to make repeated demands for payment: "the law in Germany prevented them from exercising any legal recourses for recovery of what was due to them, except to realize upon security". Here again, I agree. We are not faced in the present case with 'stale defaults', nor with the kind of situation dealt with by the British Columbia Court of Appeal in *Federal Business Development Bank vs Poznekoff*, 1983, 3 W.W.R. 1.

Another argument raised by the estate is that the respondent bank is not a creditor entitled to file a petition for a receiving order because its claim arises under German law and under German law the German bankruptcy proceedings prohibit it from suing thereon. But German law, like all foreign law, is a question of fact in Quebec courts. The Superior Court judge weighed the expert evidence presented to him concerning that question of fact and concluded that German law does not prohibit the creditor of a bankrupt debtor from suing to enforce his claim *in a foreign court*, particularly if the creditor's 'suit' is actually a petition in bankruptcy filed in the foreign court and is not designed to obtain a preference over other creditors. Such is the present case. Indeed, the judge concluded from the evidence that the respondent's petition for a receiving order had the "approval and support" of the trustee under the German bankruptcy, Dr. Görg. He added, citing, among other de-

cisions, *Allen vs Hanson*, 1891, 18 S.C.R. 667, that Canadian law is not offended by the prospect of a concurrent bankruptcy in another jurisdiction.

I have not been shown that the judge erred in this appreciation of the evidence or in these conclusions drawn therefrom.

The estate also argues — its other arguments are, I gather, subsidiary to this one — that the Superior Court judge erred in failing to consider the estate in Quebec as distinct from the estate in Germany (and from the estate in each of the other jurisdictions where parts of the Kaussen empire were situated). There is, it is argued, a "scission de la succession" and the real estate situated in Quebec cannot be held liable for the debts of the estate world-wide. The receiving order was thus, at the least, premature.

I cannot agree. It is not contested that, under the *Bankruptcy Act*, a petition for a receiving order may be filed against an estate (s. 26; s. 2, definitions of "debtor" and of "person"). True, article 6 of the Quebec Civil Code provides that Quebec law governs immoveables situated in Quebec but that moveables are governed by the law of the domicile of their owner. True also, Mrs. Skowronek accepted Kaussen's estate under benefit of inventory. It even appears that in some jurisdictions in the United States Mrs. Skowronek is not recognized as Kaussen's sole heir. None of this, however, supports the argument that there are as many estates as there are jurisdictions involved. Quebec recognizes only one estate, although that estate may be subject to the laws of more than one jurisdiction.(*) The extent

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(*) We are not faced here with the situation considered by this Court in *Estate Taggart vs Castigliola*, 500-09-001321-777, January 23, 1980. In that case, it was pointed out that the *common law*

to which the real estate situated in Quebec may be held liable for the debts of the estate world-wide is not something that must be determined on a petition for a receiving order. If he encounters difficulties in that regard, the trustee, once appointed, may apply to the court for directions, pursuant to section 16 of the *Bankruptcy Act*. What the court determines on a petition for a receiving order is whether the petitioning creditor has a claim provable in bankruptcy amounting to $1,000 against a debtor who, within the preceding six months, when resident or carrying on business in Canada, committed an act of bankruptcy. Section 25(7) gives the court discretion to dismiss the petition even if it determines that those conditions exist but in the present case the Superior Court judge decided to grant the petition. It has not been shown that he exercised his discretion improperly. This is what he said, having quoted section 25(7):

> "Very important assets and amounts of money require to be administered. Since the assets will be insufficient to pay all of the liabilities, difficult decisions will have to be made concerning the rights of creditors claiming preference, the valuation of security held by secured creditors, and the prices at which assets are to be sold. For so long as the administration of the Estate's affairs continues, the collection of rentals and payment of the operating expenses of the buildings will require the services of honest and experienced building managers. These matters are best left to a licensed trustee, answerable to the creditors and to the Court in a way that

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considers an estate to be a distinct legal entity, whereas Quebec law merely permits the heirs to be summoned collectively in legal actions instituted within a certain delay (article 116 C.C.P.). Since the delay had expired, the petition for a receiving order against a Quebec estate was dismissed. Such is not the present case. It is therefore appropriate, in my view, to say here that Quebec 'recognizes' the estate.

a beneficiary heir is not. The beneficiary heir in this case has interest opposed to those of the creditors: a trustee will be neutral. The Court's discretion should not be exercised so as to dismiss the petition.

The manner of distribution of the Estate's assets to its creditors will be complicated by the presence of the German trustee, and the location of assets in several jurisdictions. These are matters that may be left to the administration of the trustee, and to such further directions as the Court may be called upon to give him."

I agree.

Some closing remarks in answer to miscellaneous points raised by the estate: It is irrelevant to argue that the respondent bank, instead of instituting bankruptcy proceedings in Quebec, could have sued in Quebec to recover its claim; the claim is not really contested. Nor can the estate seriously argue that the bank made no demand for payment. Concerning the argument that Canadian courts will not enforce foreign tax laws, it suffices to point out that Kaussen's German tax liabilities are certainly enforceable in Germany. Finally, as regards the action in "exemplification" instituted in Quebec courts by Dr. Görg, I have already noted the Superior Court judge's finding that the petition for a receiving order had Dr. Görg "approval and support".

I would dismiss the appeal with costs.

J.C.A.

APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy under the laws of the Federal Republic of Germany for the Estate of Heinz Guenter Kaussen

---

PETITION BY GERMAN BANKRUPTCY TRUSTEE FOR ANCILLARY ADMINISTRATION PURSUANT TO 11 U.S.C. §304

Klaus Hubert Goerg, as Trustee in Bankruptcy of the Estate of Heinz Guenter Kaussen (the "Estate"), duly selected and acting in accordance with the laws of the Federal Republic of Germany, hereby files this petition pursuant to Section 304 of the Bankruptcy Code (11 U.S.C. § 304) to commence a case ancillary to a foreign proceeding, and shows the Court the following:

1.

Petitioner is the duly selected and acting bankruptcy trustee of the Estate of Heinz Guenter Kaussen, a resident and domiciliary of the Federal Republic of Germany, now deceased. Petitioner was designated as such by an order of the District Court of Cologne dated January 24, 1986, (the "Order of Adjudication"). Petitioner is, therefore, a foreign representative of an estate in a foreign proceeding as defined in paragraphs (20) and (21) of Section 101 of the Bankruptcy Code, 11 U.S.C. § 101.

Petitioner's authority as Trustee to take charge of all assets belonging to the Estate wherever located was expressly affirmed on appeal in contested proceedings by a decision dated February 17, 1986 of the Superior Court of Cologne and by two decisions dated March 3, 1986 and April 28, 1986 of the Cologne Court of Appeals, the latter being a Court of last resort in these matters.

2.

This is a case brought pursuant to § 304 of the Bankruptcy Code, 11 U.S.C. § 304, as a case ancillary to a foreign proceeding. Property of the Estate, turnover of which is sought hereby, is located in the Northern District of Georgia. Proceedings, against which stays are sought hereby, are pending in state courts located in the Northern District of Georgia. Thus, venue is proper pursuant to Section 1410 of the Judicial Code, 28 U.S.C. § 1410.

3.

Prior to his death in April 1985, Kaussen was at all times a resident and citizen of the Federal Republic of Germany. Kaussen's business enterprises were headquartered in Cologne, Germany, a majority of the assets of the Estate are located in the Federal Republic of Germany, and a majority of the creditors of the Estate are located in the Federal Republic of Germany.

4.

The Estate is being liquidated in Kaussen's domicilary jurisdiction under the supervision of the Bankruptcy Division of the District Court of Cologne pursuant to Section 215 of the Konkursordnung (§ 215 of the German Bankruptcy Act). By the Order of Adjudication and by the final decisions of the German appellate courts, hereinbefore mentioned, it has been determined, despite the active opposition of the sole beneficiary under Kaussen's will, that the Estate is insolvent. At the time of Kaus-

sen's death, his known liabilities exceeded the fair market value of his known assets worldwide by more than DM-121,000,000, or by more than $55,000,000 when this figure is converted from Deutsch Marks to dollars at current exchange rates. A report of the Trustee setting forth the assets and liabilities of the Estate has been filed with the District Court of Cologne and delivered to those persons in the United States who have requested same.

5.

The Order of Adjudication and the subsequent decisions of the German appellate courts hereinbefore mentioned were duly entered pursuant to German law and provide to Petitioner all powers necessary to enable him to take possession, in accordance with the applicable laws of the respective jurisdictions, of all foreign property belonging to the Estate, and to liquidate such property for the benefit of creditors worldwide. Such orders also expressly prohibit interference by the purported heirs of Kaussen in the Petitioner's administration of said assets. The rights of said heirs, all of whom are residents of Germany, have been duly and finally adjudicated by the Courts of Germany whose decisions are entitled to recognition and enforcement by this and other courts of the United States.

6.

Notwithstanding the beforementioned decisions of the German courts, which were affirmed on appeals to the highest court available under German law, claims against assets of the Estate are currently being pursued by Kaussen's creditors, heirs and others in separate, independent proceedings pending in this district and elsewhere in the United States. Said claims, some of which relate directly to issues which have already been adjudicated and all of which interfere with the orderly and equitable administration of the Estate pursuant to controlling law, are in direct contravention of orders of the German courts.

7.

In proceedings being conducted without regard to those pending in the Federal Republic of Germany, administrators appointed by state courts in Georgia and California have independently taken possession of property of the Estate located in their respective states, are in the process of liquidating same, and have declined either to acknowledge the rights of creditors who have filed claims in the German proceedings, or to recognize the authority of this Petitioner as Trustee to take possession of assets of the Estate located in the United States. Edgardo L. Parungao is purporting to act as the independent administrator of the property of the Estate located in Georgia.

8.

Relief pursuant to § 304 will assure the economical, uniform and expeditious administration of the Estate and will promote the interests of justice and equity and the policies of the United States as expressed in the Bankruptcy Code in that:

(a) Recognition of the German proceeding pursuant to § 304 will provide all claimants with consistent and equal treatment, regardless of where they are located;

(b) German bankruptcy law is consistent with principles of due process under the United States Constitution;

(c) German law allows recovery of preferences and fraudulent conveyances that would otherwise go unrecovered;

(d) The German court will treat all claimants, foreign and domestic, equally under German law;

(e) The principles of comity recognized by the courts of the United States require that the or-

ders of the German courts be granted respect and enforced;

(f) Claimants, who are citizens and domiciliaries of Germany, will not be permitted to circumvent valid orders of German courts by relitigating their claims in courts of the United States;

(g) The rights of those creditors of the Estate domiciled within the United States will be protected by the processes of this Court;

(h) Creditors will be able to protect their interests without having to file and prove their claims in each of the various jurisdictions where assets are located; and

(i) Proceedings under § 304 will eliminate the risk of multiple lawsuits involving the same issues in different courts and, thereby, eliminate the possibility of inconsistent orders and relieve the judiciary of unnecessary burdens while protecting the Estate against unnecessary litigation expenses.

WHEREFORE, Petitioner prays that this Court: (a) issue summons for service upon the parties against whom relief is sought and order them to show cause why the prayers of this petition should not be granted; (b) issue an appropriate stay order restraining and enjoining other proceedings with respect to the administration of the assets of the Estate, and with respect to the prosecution of claims by creditors, heirs and others against the Estate or against any of the property of the Estate; (c) direct that the property of the Estate be turned over to Petitioner; (d) order an accounting of the assets of the Estate by any party who has had possession or control of such assets since inception of the Estate; (e) order examinations and production of documents pursuant to Rule 2004 of the Rules of Bankruptcy Pro-

cedure; and (f) grant Petitioner such other and further relief as this Court deems just and equitable.

/s/ Thomas C. Shelton
THOMAS C. SHELTON
Georgia Bar No. 640800

/s/ Dennis S. Meir
DENNIS S. MEIR
Georgia Bar No. 501100

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany

---

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Summons dated June 13, 1986 together with a copy of the petition filed in this proceeding on the party listed below by depositing copies of the same into the United States mail, postage prepaid, and addressed as follows:

Edgardo L. Parungao
Guenter Kaussen Properties
800 Peachtree Street, NE
Suite 204
Atlanta, Georgia 30308

This the 13th day of June, 1986.

/s/ Robert Goldstein
ROBERT GOLDSTEIN

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany

---

CERTIFICATE

I hereby certify that I have this day mailed a copy of the petition filed this day in this proceeding to the parties listed below by depositing copies of the same into the United States mail, postage prepaid, and addressed as follows:

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This the 13th day of June, 1986.

/s/ Robert Goldstein
ROBERT GOLDSTEIN

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN pursuant to the laws of the Federal Republic of Germany

---

AMENDED AND RESTATED PETITION BY GERMAN BANKRUPTCY TRUSTEE FOR ANCILLARY ADMINISTRATION PURSUANT TO 11 U.S.C. § 304

Klaus Hubert Goerg, as Trustee in Bankruptcy of the Estate of Heinz Guenter Kaussen acting in accordance with the laws of the Federal Republic of Germany, pursuant to Section 304 of the Bankruptcy Code (11 U.S.C. § 304) hereby files this amended petition, which includes advice to the Court of developments since the filing of the petition commencing this case ancillary to a foreign proceeding, and shows the Court the following:

1.

Heinz Guenter Kaussen, now deceased, was a resident and domiciliary of the Federal Republic of Germany. Petitioner was designated the Bankruptcy Trustee of Kaussen's estate by an order of adjudication entered by the Bankruptcy Division of the Cologne Local Court on January 24, 1986, following proceedings contested by Kaussen's heirs. Petitioner is, therefore, a foreign representative of an estate in a foreign proceeding as defined in paragraphs (22) and (23) of Section 101 of the Bank-

ruptcy Code, 11 U.S.C. § 101. Petitioner's authority as Trustee to take charge of all assets belonging to the Kaussen estate wherever located was expressly affirmed following appeals by his heirs, first by a decision of the Cologne Regional Court, dated February 17, 1986, and then by two decisions of the Cologne Higher Regional Court of Appeals, the court of last resort in these matters, dated March 3, 1986, and April 28, 1986. The Federal German Constitutional Court, in a decision dated June 6, 1986, refused to review a constitutional challenge by the heirs to the earlier decisions, finding the challenge to be without merit.

2.

Venue is proper under Section 1410 of the Judicial Code, 28 U.S.C. § 1410. Property of the Kaussen estate, turnover of which is sought hereby, is located in the Northern District of Georgia. Proceedings, against which stays are sought hereby, are pending in state courts located in the Northern District of Georgia.

3.

At all times relevant, Kaussen was a citizen and resident of the Federal Republic of Germany, domiciled in Cologne. Kaussen's business enterprises were headquartered in Cologne, Germany, a majority of the assets of the Kaussen estate are located in the Federal Republic of Germany, and a majority of the estate's creditors, measured both by number and amount of their claims, are located in the Federal Republic of Germany.

4.

The estate is being liquidated in Kaussen's domiciliary jurisdiction under the supervision of the Bankruptcy Division of the Cologne Local Court pursuant to Section 215 of the German Bankruptcy Act. By the order of adjudication entered January 24, 1986, and by the final decisions of the German appellate courts, it has been

determined that the Kaussen estate is insolvent and that Dr. Goerg has the responsibility for the administration of his assets wherever located. These determinations were made despite the active opposition of Ingeborg Skowronek, Kaussen's "life companion" and the sole beneficiary under Kaussen's will, who was acting on her own behalf and on behalf of the four minor children born to her and Kaussen, who were his only heirs at law ("the Kaussen children"). At the time of Kaussen's death, his known liabilities exceeded the fair market value of his known assets worldwide by more than DM-121,000,000. A report of the Trustee setting forth the assets and liabilities of the Kaussen estate has been filed with the Cologne Local Court and delivered to those persons in the United States who have requested same.

5.

The order of adjudication and the subsequent decisions of the German appellate courts were duly entered pursuant to German law and provide Petitioner all powers necessary to enable him to take possession, in accordance with the applicable laws of the respective jurisdictions, of all property belonging to the Kaussen estate, wherever located, and to liquidate such property for the benefit of creditors worldwide. Such orders also expressly prohibit interference by the heirs of Kaussen in the Petitioner's administration of said assets. The rights of said heirs, all of whom are citizens of Germany and were residing there at the time the bankruptcy proceedings were initiated and appealed, are governed by the laws of the Federal Republic of Germany. Their rights have been duly and finally adjudicated by the courts of Germany in proceedings in which Skowronek actively participated on her own behalf as the sole beneficiary under Kaussen's will and on behalf of the Kaussen children, his only other heirs. The decisions of those courts are entitled to recognition and enforcement by this Court pursuant to Section

304 of the Bankruptcy Code and well-established principles of international comity and conflicts of laws.

6.

Notwithstanding the before-mentioned decisions of the German courts, claims against assets of the Kaussen estate are currently being pursued by Kaussen's creditors, heirs and others in numerous separate and independent proceedings pending in this district and elsewhere in the United States. Some of those claims relate directly to issues that have already been adjudicated in Germany, interfere with the orderly and equitable administration of the Kaussen estate pursuant to controlling law and are in direct contravention of orders of the German courts.

7.

In proceedings being conducted without regard to those pending in the Federal Republic of Germany, administrators appointed by state courts in Georgia and California have independently taken possession of property of the Kaussen estate located in their respective states, are in the process of liquidating same, and have declined either to acknowledge the rights of creditors who have filed claims in the German proceedings, or to recognize the authority of this Petitioner as Trustee to take possession of assets of the Kaussen estate located in the United States.

8.

A multiplicity of uncoordinated and conflicting actions have been filed in Georgia and California, seeking to dispose of assets of the Kaussen estate. Included among these, at a minimum, are the following:

(a) *In re: Estate of Guenter Kaussen, Deceased*, Civil Action No. D-22839 in the Superior Court of Fulton County, Georgia since July 1985, approving settlement of will contest between

Skowronek and the Kaussen children, but retaining jurisdiction, as more fully described in paragraph 9 below;

(b) *In re: Estate of Guenter Kaussen, Petition of Administrator with Will Annexed for Declaratory Judgment and Equitable Relief*, Civil Action No. D-22830, pending in the Superior Court of Fulton County, Georgia since September 15, 1987, as more fully described in paragraph 10 below;

(c) *In re: Estate of Guenter Kaussen, Deceased*, Estate No. 125548, the estate administration, pending in the Probate Court of Fulton County, Georgia since April 1985, as more fully described in paragraph 11 below:

(d) *Gary D. Zweifel (Guardian Ad Litem for Beatrix Kaussen, Margret Kaussen, Eva Marie Kaussen, and Hilde Kaussen) v. Dr. Klaus Hubert Goerg, Deutsche Kreditbank Fuer Baufinanzierung Aktiengesellschaft, Bayerische Hypotheken-Und Wechsekbank Aktiengesellschaft, Deutsche Hypothekenbank Frankfurt-Bremen Aktiengesellschaft, and Edgardo L. Parungao*, Civil Action No. D-51539, an action for year's support pending in the Superior Court of Fulton County, Georgia since January 12, 1988, on appeal from a judgment of the Probate Court of Fulton County denying support to the Kaussen children, as more fully described in paragraph 12 below;

(e) *Dr. Klaus Hubert Goerg, Trustee v. Ingeborg Skowronek*, Civil Action No. D-56445, a fraudulent conveyance action pending in the Superior Court of Fulton County, Georgia since May 20, 1988, now in default, as more fully described in paragraph 13 below;

(f) *Dr. Bruno M. Kubler, Trustee v. Ingeborg Skowronek v. Citizens and Southern National Bank and Citizens and Southern Trust Company, Inc. v. Dr. Klaus Hubert Goerg, Trustee,* Garnishment No. 212826, pending in the State Court of Fulton County, Georgia since March 31, 1988, as more fully described in paragraph 14 below;

(g) *In re: Estate of Guenter Kaussen, Deceased,* Civil Action No. 240596, the family allowance proceeding prosecuted in the Probate Division of the Superior Court of the State of California for the City and County of San Francisco, which was initiated on April 11, 1986, by John Sampson, guardian ad litem of the Kaussen children, as more fully described in paragraph 15 below;

(h) *In re: Estate of Guenter Kaussen, Deceased,* Civil Action No. 240596, the estate administration proceeding pending in the Probate Division of the Superior Court of the State of California for the City and County of San Francisco since June 11, 1985, as more fully described in paragraph 16 below;

(i) *Bayerische Hypotheken-Und Wechsel-Bank Aktiengesellschaft and Dr. Klaus Hubert Goerg v. James Scannell,* Civil Action No. 866205, pending in the Superior Court of the State of California for the City and County of San Francisco since July 20, 1988, as more fully described in paragraph 16;

(j) *Deutsche Hypothekenbank Frankfurt-Bremen Aktiengesellschaft and Dr. Klaus Hubert Goerg v. John F. Sampson,* Civil Action No. 893855, pending in the Superior Court of the State of California for the City and County of San

Francisco since June 28, 1988, as more fully described in paragraph 16 below; and

(k) *Deutsche Kreditbank Fuer Baufinanzierung Aktiengesellschaft and Dr. Klaus Hubert Goerg v. John F. Sampson*, Civil Action No. 893856, pending in the Superior Court of the State of California for the City and County of San Francisco since June 28, 1988, as more fully described in paragraph 16 below.

9.

The Georgia probate administration (referred to in paragraph 8(a) above) was initiated when the Kaussen will was filed for probate and Kaussen's attorney in Georgia, Eric Ranney, was appointed temporary administrator. The probate was contested by the Kaussen children through their guardian ad litem, Gary Zweifel. Skowronek and the guardian ad litem subsequently entered into a settlement agreement under which the will was to be probated and Skowronek and the Kaussen children each were to be entitled to a twenty percent share of the estate. This settlement agreement was approved by the Fulton County Superior Court. The will thereafter was probated in solemn form, and, at the request of Skowronek and the guardian ad litem for the Kaussen children, Edgardo Parungao, a former employee and friend of Kaussen, was named Administrator With The Will Annexed to administer Kaussen's estate in Georgia.

10.

Parungao on September 15, 1987, filed a declaratory judgment action in the Superior Court of Fulton County (as identified in paragraph 8(b) above). In that action, Parungao sought *inter alia* to have the Superior Court declare that the actions he has taken and the disbursements he has made from the Georgia assets collected by him were reasonable and proper. The Superior Court has

taken no action on any matter raised in the declaratory judgment action.

11.

On September 15, 1988, Parungao filed a petition in the Probate Court of Fulton County, Georgia, seeking final approval of his accounts and of all disbursements made to date from assets of the Kaussen estate in Georgia. A hearing on the petition is scheduled for November 7, 1988, at 10:00 a.m.

12.

Yet another action pending in the Superior Court of Fulton County (as identified in paragraph 8(d) above) is the application for year's support filed by Gary D. Zweifel, the guardian ad litem of the Kaussen children. The action is before the Court for a trial *de novo* after a nearly week-long trial in the Fulton County Probate Court resulted in a judgment against the Kaussen children and in favor of Dr. Goerg. In entering judgment for Dr. Goerg, the Probate Court rejected the award of appraisers who, acting *ex parte* at the request of the guardian ad litem, granted the Kaussen children $1.5 million for one year's support, the award being payable out of the Georgia assets of the Kaussen estate. The estate faces the prospect of extensive and costly further trial court proceedings, as well as likely appeals, to establish that the Kaussen children are not entitled to any additional support from the Kaussen estate. The Honorable Floyd E. Propst in December 1987, at the conclusion of the year's support trial, expressed on the record his concern that no centralized proceeding, coordinated with the bankruptcy proceedings in Germany, was then being conducted in the United States for the administration of the assets of the Kaussen estate located in this country.

13.

Dr. Goerg was compelled to file a fraudulent conveyance action (identified in paragraph 8(e) above) to re-

cover certain funds, belonging to the Kaussen estate, that are the proceeds of a fraudulent transfer Kaussen made to Skowronek shortly before his death. The funds are the proceeds of the April 1, 1985, sale of two parcels of real estate that Kaussen owned and as to which Skowronek had no interest or claim. Although at the time of the sale Kaussen was insolvent, he nevertheless directed that the proceeds from the sale of the two parcels be paid to Skowronek. She was not a creditor of Kaussen and did not give any consideration for the transfer. Skowronek has held the subject funds, amounting to approximately $1.2 million in an account with Citizens and Southern Trust Company, Inc. ("C&S") and has collected interest on them since August 1985. Since learning of the existence of this account, Dr. Goerg has maintained that the question of ownership of these funds should be determined by this Court in the context of an ancillary bankruptcy proceeding under Section 304. *See In re Metzeler*, 79 B.R. 674 (Bankr. S.D.N.Y. 1987). However, upon the initiation of the garnishment proceeding (identified in paargraph 8(f) above and more fully described in paragraph 14 below), it became apparent that the $1.2 million fund in the C&S account was about to be seized by a German creditor of Skowronek and that protection of the ownership interest of the Kaussen estate required the immediate filing of the fraudulent conveyance action in Fulton County Superior Court, pending the remand of this Section 304 proceeding from the U.S. Court of Appeals to this Court and further action by this Court.

14.

Dr. Bruno M. Kubler is the German bankruptcy trustee of a German corporation that was owned by Kaussen and Skowronek. Dr. Kubler, as trustee, obtained a personal judgment from a German court against Skowronek based on her conduct as a former director of the corporation, domesticated that German judgment in Georgia and

filed the garnishment action (identified in paragraph 8 (f) above) in the State Court of Fulton County to seize the funds held by C&S that had been fraudulently conveyed by Kaussen to Skowronek. In answer to Dr. Kubler's summons of garnishment, C&S paid the $1.2 million into the registry of the State Court of Fulton County, where it is now held. To prevent these funds from being lost to the Kaussen estate and its creditors, Dr. Goerg has been forced to file a claim in the garnishment action and to litigate in that forum, as well as in Fulton County Superior Court, the question of ownership of the property Kaussen fraudulently conveyed to Skowronek.

15.

The Kaussen children through their guardian ad litem in California, John Sampson, a former associate of Kaussen and a friend of the Kaussen family, petitioned the Superior Court in California (in the suit identified in paragraph 8(g) above) for an award of a family allowance, just as they petitioned the Fulton County Probate Court for an award of one year's support. Despite Dr. Goerg's opposition, the court in California awarded the Kaussen children an allowance of $108,000.00 from which no appeal was taken. As of November 1987, at least a portion of the $108,000 remained in the possession of John Sampson, in his capacity as guardian ad litem of the Kaussen children.

16.

Sampson, who now also serves as the administrator of Kaussen's California probate estate after being nominated by Skowronek and the Kaussen children to replace the Public Administrator appointed by the California Superior Court, has refused to recognize the status of Dr. Goerg and has opposed his efforts to obtain recognition to coordinate the administration of the California assets of the Kaussen estate with administration of assets in

Germany, Georgia, and elsewhere. As a result, Dr. Goerg and certain German creditors of the estate have been compelled to file three actions against Sampson to establish the multi-million dollar indebtedness owing to those creditors. These three actions (identified in paragraphs 8(i), (j) and (k) above) are in the midst of extensive discovery. Dr. Goerg anticipates that obtaining the needed judgments against the California administrator will be troublesome and expensive and will place an undue burden on the California and German assets of the estate. This expense will be unnecessary if the relief herein sought is granted.

17.

The multiplicity of uncoordinated actions purporting to dispose of the assets of the Kaussen estate greatly increases the possibility of, and to some extent has already led to, inconsistent judgments and orders, preferential recovery to certain claimants, relitigation of claims, delay, and increase in administrative costs to the Kaussen estate.

18.

Relief pursuant to § 304 will assure the economical, uniform and expeditious administration of the Kaussen estate and will promote the interests of justice and equity and the policies of the United States as expressed in the Bankruptcy Code in that:

(a) Recognition of the German proceeding pursuant to § 304 will provide all claimants with consistent and equal treatment, regardless of where they are located;

(b) German bankruptcy law is consistent with principles of due process under the United States Constitution;

(c) German law allows recovery of preferences and fraudulent conveyances that might otherwise go unrecovered;

(d) The German court will treat all claimants, foreign and domestic, equally under German law;

(e) The principles of comity recognized by the courts of the United States require that the orders of the German courts be granted respect and enforced;

(f) Claimants, who are citizens of Germany, will not be permitted to circumvent valid orders of German courts by relitigating their claims in courts of the United States;

(g) The rights of those creditors of the Kaussen estate domiciled within the United States will be protected by the processes of this Court;

(h) Creditors will be able to protect their interests without having to file and prove their claims in each of the various jurisdictions where assets are located; and

(i) Proceedings under § 304 will eliminate the risk of multiple lawsuits involving the same issues in different courts and, thereby, eliminate the possibility of inconsistent orders and relieve the judiciary of unnecessary burdens while protecting the estate against unnecessary litigation expenses.

19.

The parties against whom relief is sought in this proceeding are:

(a) INGEBORG SKOWRONEK, a citizen of the Federal Republic of Germany, who now resides at 233 Hampshire Drive, Beaconsfield, Province of Quebec, Canada;

(b) BEATRIX KAUSSEN and MARGRET KAUSSEN, citizens of the Federal Republic of Ger-

many, who now reside at 233 Hampshire Drive, Beaconsfield, Province of Quebec, Canada, and EVA MARIA KAUSSEN and HILDE KAUSSEN, citizens of the Federal Republic of Germany, who may be served by service on their guardian ad litem in Georgia, Gary D. Zweifel;

(c) GARY D. ZWEIFEL, ESQ., a resident of Fulton County, Georgia, who may be served at the offices of Lokey & Bowden, Suite 2500, Tower Place, 3340 Peachtree Road, N.E., Atlanta, Georgia 30026;

(d) EDGARDO PARUNGAO, a resident of Rockdale County, Georgia, who may be served at the offices of Guenter Kaussen Properties, Suite 204, 800 Peachtree Street, N.E., Atlanta, Georgia 30308;

(e) JOHN F. SAMPSON, a resident of San Francisco County, California, who may be served at his offices at 10 United Nations Plaza, Suite 650, San Francisco, California 94102; and

(f) DR. BRUNO KUBLER, a citizen of the Federal Republic of Germany, who may be served by service on his attorney of record in Georgia, Mark L. Golder, Esq. of Macey, Wilensky, Cohen, Whittner & Kessler, Suite 900, 133 Carnegie Way, Atlanta, Georgia 30303.

WHEREFORE, Petitioner prays that this Court: (a) issue summons for service upon the parties against whom relief is sought and order them to show cause why the prayers of this petition should not be granted; (b) issue an appropriate stay order restraining and enjoining other proceedings with respect to the administration of the assets of the Kaussen estate, and with respect to the prosecution of claims by creditors, heirs and others against the Kaussen estate or against any of the property of the estate; (c) direct that the property of the estate

be turned over to Petitioner; (d) order an accounting of the assets of the estate by any party who has had possession or control of such assets since inception of the estate; (e) order examinations and production of documents pursuant to Rule 2004 of the Rules of Bankruptcy Procedure; and (f) grant Petitioner such other and further relief as this Court deems just and equitable.

/s/ Thomas C. Shelton
THOMAS C. SHELTON
Georgia Bar No. 640800

/s/ Dennis S. Meir
DENNIS S. MEIR
Georgia Bar No. 501100

/s/ Robert Goldstein
ROBERT GOLDSTEIN
Georgia Bar No. 300470

Of Counsel:

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88-939 (3)

No. _____

MOTION FILED DEC 19 1988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF DR. BRUNO M. KUBLER, AS AMICUS CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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31 pp

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION OF DR. BRUNO M. KUBLER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Dr. Bruno M. Kubler, Trustee in Bankruptcy for Westaufbau GmBH and

Westaufbau Grundbesitzanlagen GmBH & Company KG, pursuant to Rule 36.1, hereby moves for leave to file the attached brief amicus curiae supporting the petition for writ of certiorari. Consent to file the brief has been obtained from the Petitioner, and the letter expressing such consent has been filed with the Clerk of this Court. The Respondent has not consented; therefore, this motion is necessary.

The background and concerns of the amicus are set forth in the Interest of Amicus Curiae section of the attached brief. In sum, the amicus is a trustee in bankruptcy appointed pursuant to the laws of the Federal Republic of Germany, to administer the assets of the two aforedescribed West German corporations,

whose assets include claims of more than $40 million against the Estate of Heinz Guenter Kaussen (deceased). Respondent is the Trustee in Bankruptcy of the Kaussen Estate in Germany.

The amicus urges that the decision of the Eleventh Circuit directing the Bankruptcy Court to entertain Respondent's petition pursuant to 11 U.S.C. Section 304 is erroneous. Goerg v. Parungao (In re Goerg), 844 F.2d 1562 (11th Cir. 1988) (Opinion reproduced in Petitioner's Appendix at page 1a). The amicus, as a foreign bankruptcy trustee and a major creditor of the Kaussen Estate, brings a different perspective to this case and presents issues of conflicts, statutory interpretation and administration not

previously raised.

Accordingly, the amicus respectfully seeks the Court's leave to file the attached brief supporting the petition for certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a case in the United States Bankruptcy Courts pursuant to 11 U.S.C. Section 304 may be commenced on behalf of an entity that is ineligible to be a debtor under 11 U.S.C. Sections 101(12) and 109(a).

2. Whether there should be an exception to the exclusive jurisdiction of a state court to administer assets of a decedent's estate located within its borders, so as to permit administration of a decedent's estate by the United States Bankruptcy Courts pursuant to 11 U.S.C. Section 304.

3. Whether assets of a decedent's estate located in California should be administered pursuant to applicable state law while assets of the same decedent located in Georgia should be administered pursuant to 11 U.S.C. Section 304.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF DR. BRUNO M. KUBLER AS AMICUS CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of Dr. Bruno M. Kubler, Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH &

Company KG pursuant to the laws of the Federal Republic of Germany, in support of the petition for writ of certiorari.

INTEREST OF AMICUS CURIAE

Dr. Bruno M. Kubler, amicus, is Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH & Company KG, and a specialist in German and international insolvency law, having extensively published in those fields.

The amicus' interest in this case arises from his position as a trustee in bankruptcy, whose estate is owed more than $40 million by the Kaussen Estate, and as a practitioner and authority in German and international insolvency law. With foreign investments

in the United States rapidly increasing, especially in real estate, amicus believes that there will be a proliferation of situations like the instant case. A split of authority has now been created by the decision of the Eleventh Circuit with respect to whether an entity on whose behalf a case is commenced under Section 304 must be eligible as a debtor under Title 11 of the United States Code. The law must be clarified as to whether assets of a foreign decedent's estate will be administered by a probate court in the state where the decedent's property is located, or by the "expensive, time consuming, and ultimately ineffective method for seeking protection and relief in the United States" under Section 304. E. Flaschen, "Does Section 304 Work?",

page 2, paper presented at American Bar Association Annual Meeting, Toronto, Canada, August 8, 1988.

The Bankruptcy Court below observed that this case was primarily a contest between Respondent and Kaussen's heirs. In re Goerg, 64 Bankr. 321 (Bankr.N.D.Ga. 1986). (Opinion reproduced in Petitioner's Appendix at page 22a). This observation is inaccurate. Respondent's efforts to secure ancillary administration is opposed by the amicus and Petitioner, and lacks support of the American creditors, and perhaps of three German banks whose claims against the Kaussen Estate are more than $50,000,000, and who have filed claims in the Probate Court of Fulton County, Georgia ("Probate Court").

Because the Kaussen Estate is

insolvent, there will be no residual estate from which Kaussen's heirs will receive a distribution in the Probate Court. An issue remains there as to whether the four Kaussen daughters may be entitled to a years' support as provided by Georgia law. See O.C.G.A. Sections 53-5-1, et seq. and 53-7-91. This issue has been tried in the Probate Court, decided adversely to the Kaussen daughters, and is on appeal in the Georgia Courts.

The Kaussen Estate has substantial assets in California. The amicus is concerned that administration under Section 304 was denied by the Bankruptcy Court for the Northern District of California, but entertained by the Eleventh Circuit. (Opinion reproduced in Petitioner's Appendix at

page 36a). This conflict has the anomalous result that Kaussen assets in California will be distributed by the probate court in California, and the assets in Georgia will be distributed pursuant to Section 304. In the event administration under Section 304 results in the removal of Georgia assets to Germany, the distribution of the assets will change drastically. The Georgia assets will pay priority German tax claims which are in excess of $20 million. These foreign tax claims would be neither payable nor recoverable in the Probate Court because the United States does not recognize foreign tax laws. Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

The Eleventh Circuit decision was characterized as displaying "[A] remarkable degree of receptivity to foreign representatives." A. Glosband and C. Katucki, "Section 304 of the United States Bankruptcy Code: Cases Ancillary to Foreign Proceedings," page 24, paper presented at American Bar Association Annual Meeting, Toronto, Canada, August 8, 1988. Perhaps it is anachronistic that amicus, himself a foreign representative, is urging this Court to apply the historical precedent of distribution pursuant to state law in connection with decedents estates, but amicus believes that the advantages of precedent outweigh the uncertainties under Section 304.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT, OTHER LOWER FEDERAL COURTS, A FINAL ORDER WITH RESPECT TO RESPONDENT FROM THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND IS CONTRARY TO LAW.

Pursuant to 28 U.S.C. Section 1410(a) and (b), when a case under Section 304 is commenced to enjoin state court proceedings and require turnover of property, the case may be commenced only in the district court for the district in which such state court sits and where such property is located. Thus, separate cases under Section 304 must be filed in each district where such actions are pending and property exists. 1 Collier on Bankruptcy, Paragraph 3.02 at 3-143 (15th Ed. 1988). The assets of the Kaussen Estate, consisting primarily of

real estate, are located in both Georgia and California. Accordingly, Respondent filed petitions to commence cases pursuant to Section 304 in the Bankruptcy Courts for both the Northern District of Georgia and Northern District of California. In separate opinions, the California and Georgia Bankruptcy Courts dismissed Respondent's petitions on the ground that a decedent's estate is ineligible to be a debtor under the Bankruptcy Code.

Although Respondent appealed the Georgia decision, no appeal was taken from the California decision. On appeal, the District Court for the Northern District of Georgia affirmed the decision (Opinion reproduced in Petitioner's Appendix at page 15a). The Eleventh Circuit reversed.

The decision of the Eleventh Circuit not only conflicts with the California decision, but also with decisions from Bankruptcy Courts in the Second Circuit holding that in order to commence a case under Section 304, the petitioning entity must be eligible as a debtor under 11 U.S.C. Section 109(a). In re Lines, 81 Bankr. 267 (Bankr. S.D.N.Y. 1988); In re Metzler, 78 Bankr. 674 (Bankr. S.D.N.Y. 1987); In re Gee, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

11 U.S.C. Section 101(35) provides:

> "'person' includes individual, partnership, and corporation, but does not include a governmental unit,. . . ."

11 U.S.C. Section 109 provides:

> "(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United

> States, or a municipality, may be a debtor under this title [11 USCS Sections 101 et seq.].
>
> "(b) A person may be a debtor under chapter 7 of this title [11 USCS Sections 701 et seq.] only if such person is not -- . . .
>
> > "(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States. . . .
>
> "(d) Only a person that may be a debtor under chapter 7 of this title 11 [11 USCS Sections 701 et seq.], except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title [11 USCS Sections 1101 et seq.]."

In re Gee addressed, inter alia, the issue of whether a Cayman Island

reinsurance company was eligible to commence a Section 304 case. The Bankruptcy Court determined that because the foreign reinsurance company was a "person" under 11 U.S.C. Section 109(a), it was therefore an eligible debtor under Section 304. 53 Bankr. at 899, 900. The court determined that the exclusions in subsections (b) and (d) of 11 U.S.C. Section 109, applicable to foreign insurance companies, would not affect petitioners' eligibility under 11 U.S.C. Section 109(a). Id.

In re Lines involved a Bermuda reinsurance company which commenced a Section 304 case. The Court held:

> "Section 109(a) applies to all chapters. By their terms, Sections 109(b) and (d) only preclude certain entities, including foreign insurance companies engaged in such business in the United States, from being debtors under

> chapters 7 and 11 of the Code.
> . . .
>
> "An ancillary proceeding under Section 304 is not a Chapter 7 proceeding or a Chapter 11 proceeding; nor is it a full scale bankruptcy proceeding. Thus, sections 109(b) and (d), by their terms, simply do not apply." 81 Bankr. at 270, 271.

Furthermore, "Subsection (a) [of Section 109] establishes the criterion which must be met for an entity to be a debtor under Title 11 generally. This is the only provision dealing with who may be a debtor in a case ancillary to a foreign proceeding under Section 304." 2 Collier on Bankruptcy, Paragraph 109.01 at 109-4 (15th Ed. 1988) Since the Kaussen Estate is not a person, it follows that these cases would hold that the Kaussen Estate could not commence a Section 304 case.

Finally, amicus believes that

the principle of federalism, which includes the right of one of the states to apply its laws to the distribution of a decedent's property within its boundaries, is the reason that decedent's estates are excluded from the definition of "person," under 11 U.S.C. Section 101(35), and accordingly the definition of "debtor," under 11 U.S.C. Sections 101(12) and 109(a).

The decision of the Eleventh Circuit is also contrary to the principle that a federal court will not assume jurisdiction over, or otherwise interfere with, property in the custody of a state probate court. Markham v. Allen, 326 U.S. 263, 66 S.Ct. 296, 90 L.Ed. 256 (1945); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 30 S.Ct. 10, 54 L.Ed. 80 (1909).

If this Court does not resolve these conflicts, the Georgia assets will have an administration pursuant to Section 304 and the California assets will be administered in the probate court according to the laws of California. Either all the assets should be administered according to appropriate state law in the appropriate probate court or all the assets should be administered under Section 304.

II. THE DEFINITION OF A DEBTOR UNDER SECTIONS 303(b)(4) AND 304 SHOULD BE UNIFORM, NOT DIFFERENT AS DETERMINED BY THE ELEVENTH CIRCUIT.

Since Section 109(a) provides that only a debtor can commence a case under any section of the Code and since a decedent's estate cannot be a debtor, a foreign representative of a decedent's

estate should not be permitted to commence a case under Section 304. Nevertheless, the Eleventh Circuit directed the Bankruptcy Court to entertain Respondent's Section 304 petition on the grounds that foreign law should determine the eligibility of the foreign entity under the Code. The Eleventh Circuit qualified this eligibility standard:

> "This analysis suggests that a full bankruptcy proceeding involving a foreign debtor may be commenced only if the foreign debtor qualifies as a "debtor" under the Code. Cf. 11 U.S.C. Section 303(b)(4)(1982)." 844 F.2d at 1568 n.13; Appendix at page 14a.

11 U.S.C. Section 303(b)(4) provides:

> "An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title . . . by a foreign representative of the estate in

> a foreign proceeding concerning such person."

The Eleventh Circuit appears to hold that a foreign entity must be eligible as a debtor under the Bankruptcy Code to bring an involuntary case, although the same foreign entity need not be eligible as a debtor under the Bankruptcy Code to commence a case under Section 304 as long as the entity qualifies as a debtor under foreign law. This distinction is illogical and without support in the Code. Because the definition of a foreign proceeding in 11 U.S.C. Section 101(22) is applicable to cases under Sections 303(b)(4) and 304, Respondent should either be permitted to commence a case under both sections despite his ineligibility under Section 109(a) or be denied relief under each section.

III. THE ELEVENTH CIRCUIT FAILED TO REVIEW THE ULTIMATE PURPOSE OF SECTION 304 IN THE CONTEXT OF A PROBATE PROCEEDING.

In reviewing the intent of Congress, the Eleventh Circuit quoted from the legislative history and stated:

> "The ultimate purpose of the Section 304 mechanism is to 'prevent dismemberment by local creditors' of assets located in this country that are involved in a foreign insolvency proceeding." 844 F.2d at 1568; Appendix at page 13a.

Probate proceedings themselves in the United States prevent dismemberment by local creditors of assets located in this country and provide for a system of distribution among creditors and other parties in interest. There is no need to invoke the Bankruptcy Court's "processes and expertise to marshal property" to aid

the foreign proceeding because the creditors' rights are established by probate law. It should be noted that administration of the Kaussen Estate in Georgia began on May 30, 1985, and not until January 24, 1986 did the West German Court enter an order of adjudication finding the Kaussen Estate insolvent and appointing Respondent as bankruptcy trustee. In June, 1986, Respondent commenced his case under 11 U.S.C. Section 304. After three and one-half years and hundreds of thousands of dollars of administration expenses and costs, judicial economy demands that the system of distribution of the Probate Court be completed.

CONCLUSION

For the foregoing reasons, the amicus respectfully urges the Court to grant the Writ.

Respectfully submitted,

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No. 88-639

SUPREME COURT, U.S.
FILED
JAN 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,

Petitioner,

v.

KLAUS HUBERT GOERG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

OBJECTIONS TO MOTION OF DR. BRUNO M. KUBLER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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OBJECTIONS TO MOTION OF DR. BRUNO M. KUBLER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Respondent ("Dr. Goerg"), having earlier declined to consent to the filing of an amicus curiae brief, now objects to the Motion of Dr. Bruno M. Kubler for Leave to File a Brief Amicus Curiae and moves that it be denied for the following reasons:

1. Movant has not informed the Court of his true interest as required by Rule 36.3:

(a) Movant is the trustee in two German bankruptcy proceedings involving German corporations owned by Kaussen at the time of his death. The primary assets of those bankrupt corporations are claims against Dr. Goerg as trustee of the Kaussen Estate based entirely on transactions that took place in Germany. The validity and amount of these claims can be determined only by the application of German law, but as yet no such determination has been made. Nevertheless, Movant has participated actively in the plenary German bankruptcy proceedings relating to the Kaussen Estate, as a member of the creditors committee and otherwise.

(b) Although the German courts have held that the Kaussen Estate is to be treated as a single estate to be administered in a single, coordinated, worldwide proceeding,[1] Movant is now seeking to recover Kaussen assets independently of the German proceedings by pressing redundant claims in the United States and Canada, and by asserting that assets located in Georgia, California and Canada should be administered in three separate and uncoordinated proceedings without regard for the rights of creditors whose claims have been recognized in other jurisdictions.[2] This conduct by Movant including his

---

[1]See German decisions at Appendix A, C and D to Respondent's Brief in Opposition, specifically the language of the German courts on pages 2a-3a, 17a-18a and 30a.

[2]Boldly asserting this position before courts in North America, Movant ignores the contradiction inherent in his seeking worldwide recognition of his German claims, while at the same time insisting that he should be allowed separate recoveries in each jurisdiction without regard for the rights of Kaussen creditors in Germany and elsewhere who have not filed claims in multiple jurisdictions.

filings in this Court are in direct defiance of the German decisions in the Kaussen proceedings and of paragraphs 12 and 14 of the German Bankruptcy Act.

(c) Because Kaussen assets in each of the three North American jurisdictions exceed his liabilities to creditors located in those jurisdictions, Movant as a creditor of the Kaussen Estate will obtain a much greater recovery if those proceedings are conducted independently than if those jurisdictions were to recognize the German proceeding as paramount and to require the kind of coordination called for by the German courts. Therefore, absent an ancillary proceeding under section 304, Movant will gain advantage over Kaussen's other creditors and obtain more than his share of the worldwide estate; the creditors of Kaussen's corporations represented by Movant will be preferred over his other creditors; and Movant will increase his entitlement to personal fees as a trustee whose compensation is dependent on the amounts he recovers for his estates.

2. Movant brings no new perspective to the issues presented in this case. The parties' briefs fully and adequately argue all issues properly before the Court, including the correctness of the Eleventh Circuit's decision, its relative importance, its impact on judicial administration, and its consistency with the decisions of other lower courts.

3. The brief Movant seeks to file raises arguments pertaining to issues that were neither decided by the Eleventh Circuit nor necessary to the Eleventh Circuit's decision. These issues are, therefore, not before this Court or properly argued here:

(a) Movant's central contention that the Eleventh Circuit's decision conflicts with *In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988) and *In re Gee*, 53 B.R. 891

(Bankr. S.D.N.Y. 1985) attacks a rationale not employed by or necessary to the Eleventh Circuit's decision[3] and fails to observe that both cases are excellent examples of courts using section 304 to provide ancillary assistance to foreign representatives whose insolvent estates were not qualified for relief under certain other provisions of the Bankruptcy Code. These two cases hold that despite the provisions of section 109(b) which exclude insurance companies from eligibility for plenary bankruptcy proceedings, foreign insurance companies may indeed be the subject of section 304 ancillary proceedings. Similarly, in *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) the Court held that the foreign representative in foreign proceeding to liquidate a bank is eligible for ancillary assistance notwithstanding section 109(b) exclusion of banks from eligibility for Chapter 7 liquidation.[4] Thus, contrary to Movant's contentions, the results in the

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[3]Citing *In re Gee*, Movant argues that section 109(a) of the Bankruptcy Code, which sets forth who may be a "debtor" under Title 11, renders Dr. Goerg ineligible to be a foreign representative in this case. That argument makes sense only if a "debtor" is necessary in ancillary proceedings under section 304, and it altogether ignores the Eleventh Circuit holding, which is consistent with principles of international comity and conflicts of law, that the subject of a foreign proceeding, if qualified for relief under the relevant foreign law, need not be a debtor under U.S. law for the foreign representative to be eligible to bring an ancillary proceeding under section 304.

[4]The concerns about federalism underlying the traditional deference of United States courts to state probate proceedings involving the estates of insolvent decedents are certainly no stronger than the concerns about federalism which induced Congress to permit state laws to govern the liquidation of insurance companies and state banks. The point is that in 1978, Congress chose international comity over federalism. Section 304 is a comity statute which Congress adopted because of its concerns relating to multinational insolvencies and the needs of domiciliary jurisdictions for ancillary assistance in collecting assets in other nations.

decisions he cites are entirely consistent with the Eleventh Circuit decision in this case.

(b) Movant's arguments based on the assumption that the Georgia bankruptcy court's powers under section 304 do not extend to Kaussen assets in California are not properly before this Court, because no lower court in this or any other proceeding has yet considered the venue requirements of section 1410(a) and (b) of Title 28 of the U.S. Code in the context of a section 304 proceeding.

(c) Movant's argument that Dr. Goerg's use of assets now located in the United States for the payment of German tax claims would be improper is based wholly on facts outside the record in this case and raises another issue no lower court has yet considered in the context of a section 304 proceeding. The claims filed by the German tax authorities in the Germany bankruptcy proceedings relating to Kaussen are yet to be resolved by the German bankruptcy court, and the German tax authorities have not asserted any claims in this section 304 proceeding. Issues relating to Dr. Goerg's payment of those claims, whether from German assets or from American assets, are not ripe for consideration by any court. In any event, those issues are not before this Court and are, therefore, improperly argued by Movant.

CONCLUSION

Movant is not properly before this Court. His opposition to Dr. Goerg and the positions he asserts are contrary to German decisions to which Movant is subject and in violation of provisions of the German Bankruptcy Act. Movant has offered no new authority or perspective to any issue before the Court, but has filed a brief raising issues that were not considered below and are

not properly raised here. For any one of these reasons, the Motion for Leave to File a Brief Amicus Curiae should be denied and the accompanying brief rejected.

Respectfully submitted,

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